Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JILL LINDSAY, ET AL, PETITIONERS

v.

ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, A BUSINESS ENTITY OF UNKNOWN TYPE, ET AL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do employees and/or former employees have the right to sue for violations of Sections 152, First and/or 152, Seventh of the Railway Labor Act ("RLA" or "the Act"), or is that right reserved exclusively to their union?

2. In interpreting those sections, can *Cort v. Ash*, 422 U.S. 66 (1975), be relied upon to imply a cause of action in favor of a union, but not its members, when it is only the members, not the union, that have suffered the injuries to be redressed?

3. Can the NLRA's *Garmon* doctrine be applied in the railway labor context so as to preempt claims seeking to vindicate balloting and ratification rights under a Union Constitution, where the claims are neither expressly preempted by the Railway Labor Act nor in actual conflict with it, and there is no administrative body to which the parties' controversies could have been submitted?

4. Can state-law claims alleging interference with and violation of ratification and balloting rights under a Union Constitution be treated as "identical" to DFR claims and, therefore, subsumed by DFR law?

PARTIES TO THE PROCEEDING

JILL LINDSAY, CAROL JOHNSON, DANIEL SANTIAGO, DEBORAH WHITTINGTON, DOTTIE LONG, JANET GOLD, JUDITH ALEXANDER, KAREN RIVOIRA, LAURENCE E. SALOMON III, PATRICIA KENNEDY, PATTY GENTRY and REBECCA SMITH were Plaintiff-Appellants below and are Petitioners here.

Plaintiff-Appellant CONSTANCE LaMATTINA is being listed as a Respondent in accordance with Supreme Court Rule 12.6.

The ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, AMR CORPORATION, AMERICAN AIRLINES, INC., and JOHN WARD were Defendant-Appellees below and are Respondents here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Jill Lindsay, Carol Johnson, Daniel Santiago, Deborah Whittington, Dottie Long, Janet Gold, Judith Alexander, Karen Rivoira, Laurence E. Salomon, Patricia Kennedy, Patty Gentry and Rebecca Smith, respectfully petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit opinion, *Lindsay v. Association of Professional Flight Attendants* (Pet. App. 1-33), appears at 581 F.3d 47 (2d Cir. 2009). The opinion of the United States District Court for the Eastern District of New York on standing and DFR issues (Pet. App. 34-98) is reported at 645 F.Supp.2d 68 (E.D.N.Y. 2008). Its earlier Opinion on ordinary preemption (Pet. App. 99-130) is unreported.

JURISDICTION

The Second Circuit entered its opinion and Judgment on September 21, 2009. Justice Ginsburg granted an extension of time to file the petition until February 18, 2009. The District Court had jurisdiction pursuant to 28 U.S.C. §1331 and 1367(a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

RELEVANT PROVISIONS INVOLVED

The Appendix (Pet. App.141-144) reproduces relevant provisions of the Railway Labor Act, 45 U.S.C. §151 et seq., the Judiciary and Judicial Procedure Act,

28 U.S.C. §§ 2201 and 2202, and the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401 et seq. Two provisions are reproduced here.

> §152, First of the RLA provides:
>
> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.
>
> §152, Seventh of the RLA provides:
>
> No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

STATEMENT

The courts below interpreted the RLA so as to transform the field of railway labor law into one in which unionized employees (and former employees) have only one potential right of action: a DFR claim against their union. (Pet. App. 9, 14). Under the rulings below, the union automatically holds and controls all other statutory claims and it is for the union alone to decide whether to assert them. By choosing

not to assert claims, the union can waive its members' vested rights.

The courts below also transformed the relationship between state and federal law so as to radically alter traditional preemption analysis. The Second Circuit eliminated the third tier of the traditional inquiry altogether, declaring that in this field "actual conflict is not a prerequisite" (Pet. App. 23), applied a preemption rule in the railway labor context that implemented Congressional intent under a significantly different statute (the NLRA), and interpreted the RLA as fully occupying a field Congress clearly chose not to occupy.

This Court's intervention is necessary to definitively resolve the preemption and standing issues raised by the RLA, the relevance of doctrines developed under the NLRA, and the interrelationship between state-law and federal common law that affect millions of railway labor employees and currently divide the Circuits. Its intervention is also required to ensure adherence to its standing and preemption jurisprudence.

A. The Events Leading To Suit

In 2001, American Airlines (hereinafter "the Carrier," "Employer" or "Airline") and its flight attendants concluded negotiations under Section 6 of the Railway Labor Act. They made their collective bargaining agreement ("CBA") amendable, at the earliest, November 30, 2004. (Ct. Appeals Jt. Appdx ("JA") 2411, ¶5-7). With its ratification, the right to wage and benefit levels vested through that date.

Although the CBA was supposed to remain in force at least until November 30, 2004, in early 2003, the Carrier suddenly demanded permanent and non-negotiable givebacks of $340 million/year- effective May 1, 2003.

After conducting a ratification vote that was unprecedented in the history of the American Arbitration Association[1]- and that the Union formally set aside as "tainted"– the Union agreed to the Airline's terms. (JA 1245-46; 1469-72). Neither the Carrier nor the Union contend that this second CBA (referred to as the "Restructuring Participation Agreement" or "RPA") was the result of Section 6 procedures. At no time did the Carrier apply to or receive the approval of a bankruptcy court to abrogate the original agreement.

After the ratification vote, three things became clear: (i) the level of concessions the Company demanded were determined by long-term competitive

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[1]The Administrator in charge of elections at the American Arbitration Association testified that, to the best of his knowledge, it was the only time in AAA's history that it had ever been asked to: extend a ratification vote beyond its original deadline, permit balloting to continue after results were announced, and change voting rules midstream. (JA 1245-6). AAA told the Union, "we have never done [this] before," (JA 1246) and required APFA to instruct it in writing. At the Airlines' urging, APFA not only directed AAA to re-open the vote and accept new ballots, but also to permit already-cast ballots to be changed. (JA 1482-83, 2426-27, JA 1607-09). It did so notwithstanding the fact that, under its Constitution, ballots received after the deadline specified for the vote were to be treated as "void" (JA 1467; Art.VI.5.E, Art.XI.I.E.2, Art.IX.6.A.4), and that it knew that a mid-term rules change could compromise the vote's integrity. (JA 152; JA147-8; JA2424-25 ¶¶89-91; JA 609-610).

considerations, and not—as had been represented- by the need to meet short-term contingencies; (ii) the Company intended those concessions to be permanent, regardless of its financial condition (JA 2412, 2414, 2422, 3632-33, 3648-49, 3689, 1334); and (iii) while it was comparing its costs to its low-cost competitors and determining how much to demand back from its employees, the Company had conferred significant new benefits on high-ranking management, (JA 2412 ¶11; 3641-42) including bonuses and a special bankruptcy-protected retirement plan for senior officers funded from the Company's cash balance. (Id.) Additional facts necessary for an understanding of Point II are presented there at note 21.

Petitioners are a group of American Airlines current and former flight attendants and current and former members of the Association of Professional Flight Attendants ("APFA" or "the Union") who sued both as individuals and on behalf of some 20,000 similarly situated past and present flight attendants. (JA 76). At least 2,000 members of the putative class are no longer bargaining unit members. (E.g., JA 5197 ¶53).

B. Petitioners' Claims and Injuries

Three sets of claims are relevant: (1) claims against the Carrier under the RLA and Declaratory Judgment Act for having violated RLA Sections 152, First and Seventh (the "status quo" or statutory claims);[2] (2) state-law claims against the Union and

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[2]Plaintiffs proceeded under §§152, First and Seventh and 28 U.S.C. §§2201 and 2202.

Carrier for violating or interfering with members' ratification and balloting rights ("Union Constitution" or "UC" Claims); and (3) claims against the Union for breaching its "duty of fair representation" ("DFR"), and against the Airline for causing or contributing to those breaches.

In each instance, Petitioners sought to redress *injuries inflicted on themselves and other employees, not injuries inflicted on the union.* They sought to recover at least a portion of the wages and benefits they lost as a result of the status-quo violations, and damages for the deprivation of their balloting and ratification rights. They did not seek a bargaining order or damages for the union.

The District Court had jurisdiction over Petitioners' claims under 28 U.S.C. §§1331 and 1367(a). Because the state-law claims concerned the Union's Constitution and *not* a collective bargaining agreement, [3] they did not present "minor disputes," could not be heard by an Adjustment Board, and were not preempted under *Norris v. Hawaiian Airlines*, 512 U.S. 246 (1994).

C. Proceedings In The District Court

The action began as three separate lawsuits: *Lindsay v. Association of Professional Flight Attendants* was commenced in the Superior Court for the County of Los Angeles; *Ford v. Association of*

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[3]Plaintiffs could not assert their breach of Constitution claims under Section 301 because 29 U.S.C. §185 does not apply to RLA employees.

Professional Flight Attendants, in the Eastern District of New York; and *Marcoux v. American Airlines, Inc.*, in the Southern District of New York.

Lindsay was removed to the United States District Court for the Central District of California, which denied plaintiff's motion to remand. (Pet. App. 131-140). The Union and Airline argued against remand on the ground that "all of Plaintiff's claims implicate and/or fall within the ambit of the duty of fair representation ...". (Pet. App. 136). Where that is so, they maintained, plaintiff's claims "are governed exclusively by federal law and are completely preempted." (Pet. App. 135). The District Court in large part agreed. (Pet. App. 131-140). It also transferred *Lindsay* to the Eastern District of New York where, following transfer of *Marcoux*, the three cases were assigned the same Judge and subsequently consolidated.

In 2006 and 2008, Respondents sought dismissal of the statutory and state-law claims on legal grounds, and the DFR claims on the merits. The District Court granted Defendants' motions in their entirety, dismissing the statutory claims for failure to state a claim (Pet. App. 69-74) and the state law claims as preempted (Pet. App. 107-114). It granted Defendants summary judgment on the DFR claims (Pet. App. 81-90), and dismissed the motion for class certification as moot (Pet. App. 91).

D. Proceedings In The Court of Appeals

The Second Circuit affirmed. (Pet. App. 1-33). Like the District Court, it held that where there is a

functioning union, only the union- not its members- can sue under the relevant sections of the Railway Labor Act. (Pet. App. 4-16). Also like the District Court, it found Petitioners' "Union Constitution claims" preempted. It did so on the ground that they were "in substance, identical to ... DFR claims" and, thus, preempted under *Garmon*. (Pet. App. 16-24, 32n.8) Finally, it reiterated that, in the case of DFR claims, the principal question is whether the union has acted "so far outside a wide range of reasonableness" as to be "wholly irrational or arbitrary" (Pet. App. 25, 29, 33n.9), even when the conduct called into question relates to internal union matters rather than traditional negotiations or grievance-handling.

E. The Statutory Scheme

The RLA is *sui generis* in several respects. Two of them distinguish it from the NLRA, and those differences are critical to the division among the circuits submitted for this Court's resolution.

Section 6 Procedures: The Act choreographs an elaborate and precisely sequenced set of procedures that "carriers" and "employees" are required to follow during the course of bargaining. The procedures are extensive and each phase is mandatory. They begin with lengthy arms-length negotiations between the parties' representatives and progress through mediation, voluntary arbitration, and a mandatory 30-day cooling off period. While they are working their way through these stages, neither party may alter the status quo. It is only once these procedures have been exhausted, *without* an agreement having been reached, that the parties may resort to self-help. If- as a result

of this process- a collective bargaining agreement is concluded, then, the provisions of §152 Seventh obtain.

Administrative Agencies: There are two types of administrative agencies under the Railway Labor Act: the National Mediation Board ("NMB") and Adjustment Boards. The Adjustment Boards adjudicate "minor disputes."[4] The NMB has no equivalent adjudicatory authority. See, e.g., *Chicago & North Western Rwy. V. UTU*, 402 U.S. 570, 580 (1971)(the NMB has no adjudicatory function under the 1926 Act); *Detroit & T.S.L.R. Co. v. UTU*, 396 U.S. 142, 158 (1969)(the NMB has "no adjudicatory authority with regard to major disputes nor has it a mandate to issue regulations construing the Act generally"); *Pan American World Airways, Inc.*, 7 N.M.B. 168, 225 (1979). It has no authority to interpret the Act, enjoin statutory violations, award damages for such violations, or otherwise adjudicate employee-carrier claims. Claims to the effect that the Act has been violated can only be adjudicated by a court.

The administrative scheme established by the RLA is thus the reverse of that established by the NLRA. Under the NLRA, statutory violations *can only be decided by an agency* (the NLRB), while claims that a CBA has been breached come within the subject matter jurisdiction of the courts.[5] See L.M.R.A., §301,

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[4]"Minor disputes" refer to grievances that require the interpretation of the terms of a collective bargaining agreement.

[5]Of course, when the parties have agreed that a contractual grievance-and-arbitration procedure shall be an employee's exclusive remedy, the employer can defend against a claim in court on the grounds that the employee has failed to exhaust contractual remedies. Generally, an employee can only overcome that defense

29 U.S.C. §185. Under the RLA, statutory violations *can only be decided by a court*, while claims that a CBA has been breached must be brought before an Adjustment Board. In other words, claims committed to an agency under the NLRA are committed to the courts under the RLA, and vice versa. In sum:

Type of Claim	Under The NLRA	Under The RLA
Statutory violations	Primary jurisdiction over these claims lies in the NLRB. State and federal courts cannot entertain them.	Claims for violations of § 152 can *only* be decided by a court. No agency or Board has jurisdiction.
Claims that a CBA has been breached.	These claims can be brought in court, provided the parties have not made a contractual grievance-&-arbitration procedure the exclusive remedy. (See footnote 5.)	Known as "minor disputes," these claims can only be brought before an Adjustment Board in the first instance, not to court.

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by showing (i) that the CBA gave his Union control over the grievance-and-arbitration process, and (ii) that, in handling his grievance, the Union breached its "DFR." Even where he has not sued his union, an employee will be required to prove "hybrid claims." In other words, his ability to proceed against his employer for a breach of the CBA will be *conditioned on* his proving a related DFR-breach by his union.

The fact that there is no RLA equivalent to the National Labor Relations Board– i.e., no agency with jurisdiction to interpret the RLA and rule on statutory violations– leads to dramatic consequences. (This is discussed at Point II).

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER EMPLOYEES AND FORMER EMPLOYEES HAVE THE RIGHT TO SUE FOR VIOLATIONS OF THE "STATUS QUO" PROVISIONS OF THE RLA.

A. The Circuits Are Divided On The Issue Of Whether Current Employees Have A Private Right of Action

The Court below concluded, as a matter of first impression, "that neither §152, First nor §152, Seventh provides a private cause of action to individual employees against their employers under the circumstances present here." (Pet. App. 16). Much mischief lurks in that phrase and, if not rapidly repaired, like a leaking oil tanker, will quickly pollute the surrounding waters.

While the holding is ultimately qualified to mean that the only party with standing to sue for violations of the status quo is the union– a conclusion in direct and substantial conflict with this Court's "associational standing" and labor law jurisprudence (*see* Points I.B.1

and .2 below)– it is rooted in the conviction that relevant sections of the RLA, and perhaps the entire Act, imply no private right of action at all. (Pet. App. 5-6, 8-10, See Opn at 5, 7, 17.) At least three Circuits have expressly rejected the analysis upon which the Second Circuit rested this preliminary conclusion. See *Lebow v. American Trans Air, Inc.*, 86 F.3d 661, 671 (7th Cir. 1996); *Stepanischen v. Merchants Despatch Transportation Corp.*, 722 F.2d 922, 926-27 (1st Cir. 1983); *Burke v. Compania Mexicana de Aviacion, S.A.*, 433 F.2d 1031, 1032-1034 (9th Cir. 1970).

Equally importantly, both this Court and every other Circuit[6] have recognized the existence of a private right of action for violations of the status quo. *See generally, Consolidated Rail Corp. v. Railway Labor Executives Ass'n*, 491 U.S. 299, 302-303 (1989); *Chicago & N.W.R. Co. v.United Transportation Union*, 402 US 570, 574-581(1971); *Detroit & Toledo Shore Line R. Co.* v. *United Transportation Union*, 396 U.S. 142 (1969); *Order of R.R. Telegraphers v. Chicago & N.W. Ry. Co.*, 362 U.S. 330 (1960); *Order of Rwy Conductors of America v. Pitney*, 326 U.S. 561, 566 (1946); *Order of Rwy Telegraphers v. Railway Express Agency*, 321

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[6] *See, e.g., I.A.M. v. Transportes Aereos Mercantiles*, 924 F.2d 1005 (11th Cir.)(under §152, First), *cert. den'd*, 502 U.S. 855 (1991); *United Transport. Union, L. 63e v. Penn Cent.*, 443 F.2d 131 (6th Cir.)(under §§152, Seventh and 156), *cert. den'd*, 404 U.S. 938 (1971); *Southern Ry. v. B.L.F.E.*, 384 F.2d 323 (D.C. Cir. 1967)(under §152, First); *United Indus. Workers v. Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965) (under §152, Seventh and 156), *on appeal following remand*, 368 F.2d 412 (1966), *on appeal following second remand*, 400 F.2d 320 (1968), *cert. denied*, 395 U.S. 905 (1969); *Railroad Yardmasters v. Pennsylvania R.Co.*, 224 F.2d 226 (3d Cir. 1955)(under §152, Seventh).

U.S. 342, 347 (1944); *Virginian R.Co. v. System Federation, No. 40*, 300 U.S. 515, 542-550 (1937); *Texas & New Orleans R.R.Co. v. Bhd. of Rwy & Steamship Clerks*, 33 F.2d 13, 14-17 (5thCir. 1929), *aff'd*, 281 U.S. 548, 565-566, 569 (1930).

Given the virtually universal reading of the statute and status quo provisions as privately enforceable, the Second Circuit ultimately rested its decision on somewhat narrower grounds: even assuming some private right of action, it is not available to employees. (Pet. App. 9, 16).

The Circuit's position on this narrower issue can be viewed from two perspectives: either that employees do *not* have standing to sue under the Act, or that *only* unions do. (Pet. App. 10-13, 16). Whichever is adopted, the Second Circuit's decision is in conflict with other Circuits and seminal decisions of this Court.

Seven Circuits have reviewed claims filed by employees under one of the two status quo provisions at issue here. The Second stands alone in finding that employees lack standing. Every other Circuit has either acknowledged or *assumed* they had standing or would have standing where the "status quo" is actually implicated. *See, e.g., Regional Airline Pilots v. Wings West Airlines*, 915 F.2d 1399, 1403 (9th Cir. 1990), *cert. den'd*, 501 U.S. 1251 (1991)(dismissing claims by employees and union where there had never been a CBA or any "negotiation process instituted at all"); *Kushto v. Bhd. of Rway Airline & Steamship Clerks*, 818 F.2d 290 (4th Cir. 1987)(employees' claims presented a "minor" rather than "major" dispute);

Carbone v. Meserve, 645 F.2d 96 (1st Cir.), *cert. den'd*, 454 U.S. 859 (1981)(same); *Mungin v. Florida East Coast Rwy Co.*, 318 F.Supp. 720, 724, 725, 730 (M.D.Fla. 1970), *aff'd*, 441 F.2d 728 (5th Cir.), *cert. den'd*, 404 U.S. 897 (1971)(on remand, reiterating holding that employees have a cause of action); *Mungin v. Florida East Coast Rwy Co.*, 416 F.2d 1169 (5th Cir. 1969)(earlier appeal in which Circuit expressly recognized employees' right to sue); *Hilbert v. Pennsylvania R.R.*, 290 F.2d 881, 885 (7thCir.), *cert. den'd*, 368 U.S. 900 (1961)(employees' claims presented a "minor dispute"); *Brotherhood of Railroad Trainmen v. Smith*, 251 F.2d 282 (6th Cir.), *cert. den'd*, 356 U.S. 937 (1958) (affirming injunction issued *inter alia* under 152, Seventh); *Dwellingham v. Thompson*, 91 F.Supp. 787 (E.D.Mo. 1950), *aff'd sub nom. Rolfes v. Dwellingham*, 198 F.2d 591 (8th Cir. 1952)(affirming entry, in mixed dispute context, of preliminary injunction that restored the status quo).[7] While the employees' claims under the "status quo" provisions did not, in many instances, prosper, their standing to sue was effectively acknowledged. None of the decisions even suggests employees may not have standing, or that only their union would.

Only two Circuits have clearly held that employees do **not** generally have a private right of action under the Railway Labor Act: the Second Circuit in this case and the Third Circuit in *Bensel v.*

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[7]*See also Kaschak v. Consolidated Rail Corp.*, 707 F.2d 902, 908-910 (6th Cir. 1983) (analogizing an employee's right to sue under the RLA with the right to sue under section 301 and noting that "[t]he rights of the individual employee as against the employer are not coextensive with those of the union").

Allied Pilots Ass'n, 387 F.3d 298 (3d Cir. 2004), *cert. den'd*, 544 U.S. 1018 (2005). At best, *Bensel* provides only arguable support for the Second Circuit's decision.[8] It may even support Petitioners on the specific issue of employees' right to sue their employer for violations of the status quo.[9]

B. When The Issue Of Standing Is Viewed From The Opposite Perspective And The Question Is Whether Unions Alone Have The Right To Sue, The Second Circuit's Decision Also Conflicts With Controlling Decisions of This Court, Both in The Labor And Article III Standing Context.

Because the injuries sought to be redressed in this suit are those *employees* have suffered– as opposed to those suffered by a union– the union could only have brought this suit if it had third-party standing. *See generally Associated General Contractors v. Carpenters*, 459 U.S. 519, 541 n.46, 545 (1983); *Transportation Workers Union v. Transp. Secretary*, 492 F.3d 471, 475 (D.C.Cir. 2007); *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 618 (6th Cir. 2004)(noting that a union could not sue in its own right "for depressed wages because it does not receive wages; it negotiates them;" to represent employees on such a

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[8]The employees in *Bensel* did not sue for status quo violations or under §§152, First and/or Seventh.

[9]In a separate part of the decision, the Third Circuit states that plaintiffs *had* "statutory rights" under the status quo provisions that they did not waive. It then treats those claims as if they had been asserted by the employees and concludes, on the facts, that the status quo was not violated. 487 F.3d at 315-316.

claim, it would have to sue in an "associational capacity").

Theoretically, there are three sources from which a union could derive the authority to sue on employees' behalf. Congress could authorize it to sue. The employees themselves could authorize it to sue. Or, it could base its authority to sue on "representative" or "associational standing" principles. The Courts below relied exclusively on authority conferred by Congress pursuant to the Railway Labor Act.[10] Under their reading of the Act, under the statute, a union automatically acquires the right to sue on employees' behalf when the majority of a "craft or class" chooses it as their bargaining agent. Its right to sue is not only automatic, according to the *Lindsay* Courts, but also exclusive, precluding employees from suing on their own behalf. (Pet. App. 11-13, 16-17).

Each aspect of this holding contravenes this Court's precedents. The view that a union automatically obtains the right to assert and settle claims when it becomes employees' exclusive bargaining agent is contradicted by *Elgin v. Burley*, 325 U.S. 711 (1945), *adhered to on rehearing*, 327 U.S. 661 (1946), and the suggestion that it obtains an exclusive right to sue on its employee-members' behalf is contradicted by this Court's Article III "associational standing" jurisprudence.

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[10]As previously noted, they could not rely on Section 301 since it does not apply to RLA employees. (It doesn't apply for obvious reasons: because it authorizes suit in court for breaches of a CBA. Under the RLA, breach-of-CBA claims are to be brought before an Adjustment Board.)

1. The Second Circuit's Decision Contravenes *Elgin*.

In *Elgin, Joliet & Eastern Rwy Co. v. Burley*, *supra*, this Court drew a line between majority rule and individual rights. It held:

(1) that one cannot assume from the fact that a union "occupie[s] the position of collective bargaining agent and as such ha[s] power to deal for the future," that it has similar authority "to settle" or "represent" employees on claims, looking to the past. 325 U.S. at 741.

(2) that neither of the latter prerogatives is "part of the collective agent's exclusive statutory authority," *id.* at 740, and

(3) that, for a certified union to act in either such capacity, it must first be expressly authorized to do so by the employees it represents. *Elgin* effectively establishes a consent rule. A union must be given express authority "over and above any authority given by the statute" before it can represent or settle employees' claims. *Id.* at 741. Its authority is not automatic.

The Second Circuit held the opposite: that the statute conferred on APFA the exclusive authority to sue on the flight attendants' behalf by virtue of the fact that it is their bargaining agent. While *Elgin* would not preclude a finding, under the appropriate circumstances, that a union has third-party standing, it makes it clear that the RLA itself could not confer such standing.

2. The Second Circuit's Decision Contravenes *Warth, Hunt, and Brown Group.*

There is no statutory basis for third-party standing, and no claim of express authorization here. The only basis upon which to find third-party standing lies in the representative or associational standing principles developed in the context of this Court's Article III jurisprudence. The decision below stands that jurisprudence on its head. It implies a cause of action in favor of an entity that does not itself meet Article III's requirements (the Union), to the exclusion of those who clearly do (the employees).

This Court has made it clear that under representative or associational standing principles, a union can only sue on its members' behalf when the members could themselves sue in their own right. *See generally, N.Y. State Club Ass'n Inc. v. City of New York*, 487 U.S. 1, 9 (1988)("an association has standing to sue.... when ... members would have standing to bring the same suit"); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Warth v. Seldin*, 422 U.S. 490, 511, 516 (1975). *See also United Food & Commercial Union v. Brown Group*, 517 U.S. 544, 551-552 (1996). This is because the Union's standing in these circumstances is derived from that of its members. Accordingly, any standing it has is cumulative, not exclusive. It does not displace its members' rights. Thus, far from APFA being the only appropriate plaintiff here, in fact APFA would only have been able to sue because its members also have that right.

3. The Second Circuit's Interpretation Of The RLA Brings It Into Direct Conflict With The Plain Language Of 29 U.S.C. § 411(a)(4).

In 1959, Congress passed what has generally come to be known as the Union Member Bill of Rights. Section 101(a)(4) of the L.M.R.D.A., 29 U.S.C. § 411(a)(4), states as follows:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before an administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, ...

29. U.S.C. § 411(a)(4). By holding that a designated union inherently limits – indeed eliminates – its members' right to sue, the ruling below not only contravenes the Railway Labor Act, it clashes with this express Congressional prohibition.

Early in its Opinion, the Second Circuit acknowledges that the status quo provisions "may well benefit" employees. (Pet. App. at 10, 15). It then proceeds, under the second and third of *Cort v. Ash*'s four factors,[11] to imply a private right of action *only* in favor of their "association." (Pet. App. 11-12, 15-16). So doing, it not only contravened the intent of the status quo provisions, the Act as a whole, and L.M.R.D.A.

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[11]422 U.S. 66 (1975).

§101(a)(4), but also effected an end-run around this Court's established "associational standing" jurisprudence and basic Article III requirements. (Pet. App. 8-12, 15). This Court should grant certiorari to make it clear that no cause of action can be "implied" from any statute in violation of its Article III jurisprudence.

C. The Circuits Are Divided On The Issue Of Whether A Union Can Represent Former Employees.

Approximately one-third of the plaintiff group and several thousand members of the putative class are no longer employed by the Airline or members of the Union. (See e.g., JA 5197 ¶53). See generally, *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 176 (1971)("[r]etirees are neither 'employees' nor bargaining unit members").

The Circuits are deeply divided on the question of whether a union can represent former employees. There are four views. At least two Circuits take the position that a union does not have associational standing to represent non-members. See *United States v. City of Miami*, 115 F.3d 870, 872-873 (11th Cir. 1997)(union not have associational standing to represent non-members); *Bangor & Aroostoock R.Co. v. B.L.F.E.*, 442 F.2d 812, 820 (D.C.Cir. 1971)(same). *See also I.B.E.W. v. Citizens Telecom. Co. of*

California, 549 F.3d 781, 787, 789 (9th Cir. 2008)(probably not have associational standing).[12]

The Fifth, Sixth and Seventh Circuits have effectively adopted a consent rule. *See, e.g., I.A.M. v. Goodrich*, 410 F.3d 204 (5th Cir.), *cert. den'd*, 546 U.S. 1015 (2005); *United Steelworkers v. Cooper Tire*, 474 F.3d 271, 283 (6th Cir. 2007); *Cleveland Electric v. Utility Workers Union Local 270*, 440 F.3d 809, 818 (6th Cir. 2006); *Exelon Generation v. Local 15*, 540 F.3d 640 (7th Cir. 2008); *Rossetto v. Pabst Brewing Co.*, 128 F.3d 538, 538-539 (7th Cir. 1997), *cert. den'd*, 524 U.S. 927 (1998). The Eighth Circuit takes the position that a union can incidentally represent former employees in a suit legitimately brought in its own interests. *See I.B.E.W. v. GKN Aerospace*, 431 F.3d 624 (8th Cir. 2005).

Only the Second Circuit has held that a union has an automatic and exclusive right to sue on behalf of former employees. (Pet. App. 2, 15-16).[13] Like the issue concerning the union's preemptive right to represent *current* employees, this is an issue that potentially affects millions of employees in all unionized industries and all Circuits. Also like that issue, it implicates and must be decided in conformity with associational

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[12]Because the union had associational standing to represent those who were still employees, it was not deprived of standing to compel arbitration. 549 F.3d at 789.

[13]Indeed, the Second Circuit appears to have believed that all of the plaintiffs and everyone in the putative class are former employees. (Pet. App. 2). That is mistaken. While a substantial number are, both the plaintiff group and putative class include past and present employees, and former and current union members. (Pet. App. 66, 100).

standing principles. Given the plethora of views on the issue, this Court's intervention is required.

D. Reasons The Issue Of Standing Is Important: Because The Court Of Appeals Improperly "Hybridized" - Indeed "Over-Hybridized" - The Law And Permitted Majority Rule To Extinguish Vested Rights.

The Court of Appeals "superhybridized" the employees' claims against their employer when no hybridization was warranted. The term "hybrid claims" is used in the labor context to characterize claims for which an employee's ability to sue his employer is *conditioned upon* first being able to show that his or her union breached its duty of fair representation. The circumstances under which claims can properly be treated as "hybrid claims" are very, very limited.[14] None of the three preconditions for hybridizing is present here.

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[14]"Hybrid claims" arise only when: (1) an employee sues his employer for the breach of a collective bargaining agreement; (2) the bargaining agreement establishes an extra-judicial procedure (generally, a grievance-and-arbitration procedure) as the employee's exclusive remedy; and (3) the union is expressly given control of the extra-judicial procedure by the agreement. Under these circumstances, an employee will be relieved of his "failure to exhaust his contractual remedies" and be permitted to proceed against his employer in court if he can prove that, as a result of a DFR breach by his union, he was deprived of his extra-judicial remedy. *See, e.g., Breininger v. Sheet Metal Workers Int'l Ass'n*, 493 U.S. 67, 80 (1989); *DelCostello v. I.B.T.*, 462 U.S. 151, 163-165 (1983); *UPS v. Mitchell*, 451 U.S. 56, 61-62 (1981); *Hines v. Anchor Motor Freight*, 24 U.S. 554, 567-570 (1976); *Vaca v. Sipes*, 386 U.S. at 184-186.

The decision below did not simply *condition* the employees' right to sue their employer on their first proving a DFR breach, but substituted a DFR claim against *the union* for any and all claims against *the employer*. (Pet. App. 9, 14).

Unless the Second Circuit's decision is reversed, this substitution will have far-reaching consequences. As a practical matter, it will transform unions from an agent and advocate for employees into a shield for employers. As a legal matter, it will leave employees with only one source from which to recover significant economic losses: their union.

Making unions solely liable for losses inflicted by employers violates principles to which this Court has long adhered regarding the proper allocation of damages as between an employer and a union. *See, e.g., Bowen v. United States Parcel Service*, 459 U.S. 212, 221-223 (1983);[15] *IBEW v. Foust*, 442 U.S. 42, 49-50

The law of "hybrid claims" has *no* application to a case such as this, where the claims against the employer are *statutory claims* rather than those brought under a collective bargaining agreement that provides for what parties have agreed should be a union-controlled administrative procedure. As noted *infra*, in the railway labor context, statutory claims can *only* be heard in a judicial forum; they cannot be referred to any agency. Therefore, statutory claims against an employer under the RLA and DFR claims against a union cannot be made "hybrid claims." Even when they arise out of common facts, claims against an employer for violating the status quo do not *depend upon* the DFR claims. See, e.g., *Repstine v. Burlington Northern, Inc.*, 149 F.3d 1068, 1071-1072 (10th Cir. 1998).

[15]Four Justices, including then Associate Justice Rehnquist, dissented in *Bowen* on the grounds that the employer should have

(1979); *Vaca v. Sipes*, 386 U.S. 171, 196-198 (1967). Under those principles, an employer is neither to be relieved of nor "shielded from the 'natural consequences' of its breach by wrongful union conduct"[16] and employees are not to be left "remediless." 459 U.S. at 222. The latter principle, often referred to as the "compensation principle," is "[o]f paramount importance." *Id.* Under it, employees are entitled to be made whole.

Substituting a "DFR claim" against the union for all claims against the employer, would institute a scheme that violates both principles. It would relieve employers of statutory responsibilities of which they are not entitled to be relieved, and leave employees with no effective remedy. Indeed, it would require employees to satisfy a standard of liability that it is virtually impossible to meet in order to obtain a judgment against a defendant that cannot make them whole.

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been "primarily liable for all backpay;" no portion should have been shifted to the union. 459 U.S. at 231-243.

[16]"Thus if the petitioner in this case does not collect the damages apportioned against the Union, the ... [Employer] remains secondarily liable for the full loss of backpay." *Bowen*, 459 U.S. at 223.

II. THE COURT SHOULD GRANT CERTIORARI TO RE-ESTABLISH ORDER IN THE AREA OF RLA PREEMPTION AND CLARIFY THE RELATIONSHIP BETWEEN DFR LAW AND CLAIMS THAT RIGHTS UNDER A UNION CONSTITUTION HAVE BEEN VIOLATED.

While this Court attempted, in *Norris v. Hawaiian Airlines, supra*, to settle the issue of RLA preemption for all time, in the past ten years, the law on this issue has shown greater entropy than cohesiveness: different Circuits take widely different views and apply markedly different tests. (See Subpoint C, *post*). With the Opinion below, the Second Circuit has accelerated the pace at which the federal labor-law universe is expanding, and the state-law universe contracting.

The decision below clones the rule prescribed by *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and grafts it on to the RLA.[17] While acknowledging that "*Garmon* was decided in the context of the National Labor Relations Act," the Circuit relies on two decisions to "extend" *Garmon* to the RLA: this Court's decision in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969) and the decision in *Bensel*, 387 F.3d at 321. (Pet. App. 19).

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[17]Superficially, the clone is distinguishable from its NLRA-model in only one respect: It preempts claims concerning conduct actually or arguably protected or prohibited *by the RLA, instead of the NLRA*. (Pet. App. 17, 19, 23, 110). Beneath the surface, the differences are far-reaching.

Once again, the Second and Third Circuits stand together, but alone, in their misreading of this Court's precedents. They misread the *Jacksonville Terminal* decision. This Court did not apply *Garmon* preemption in that case; but rather, what has come to be known as *Machinists* preemption.[18] It even expressly cautioned against confusing the two types of preemption.[19] Thus, it warned that "care must be taken to distinguish preemption based on federal protection of the conduct in question ... from that based predominantly on the primary jurisdiction of the National Labor Relations Board." 394 U.S. at 384 n.19. It identified *Garmon* as the second type of preemption and *Machinists* is a quintessential example of the first type.[20]

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[18]All doubt on this question is eliminated by two facts: The decision in *Machinists* adopts *Jacksonville's* preemption test *verbatim*, and expressly credits *Jacksonville* with having formulated the correct test. *See International Association of Machinists v. Wisconsin Employment Relations Board*, 427 U.S. 132, 147-148 (1976)(*Jacksonville* test embraced by the majority); Concurrence at 155 (agreeing *Jacksonville* provides the correct test): Dissent at 156-159 (*Garmon* should have been applied instead).

[19]It also generally cautioned against applying NLRA policies to the RLA: "We refer to the NLRA's policies not in order to 'apply' them, ... [this] would be neither justified nor practicable- but only to determine whether [the activity in question, there picketing] is within the general penumbra of conduct held protected by the Act, or whether it is beyond the pale of any activity thought permissible." 394 U.S. at 384. It further noted that "Congress has invested no agency with even colorable authority" to adapt "the NLRA's principles to railway disputes," *id.* at 391-392, and that the RLA has no agency equivalent to the NLRB. *Id.* at 384 n.19.

[20]*Machinists* preemption protects conduct that Congress intended to be *un*regulated from regulation by state law.

Because the Second Circuit's decision misreads *Jacksonville* and ignores important differences between the RLA and the NLRA, its decision is irreconcilable with fifty years of this Court's preemption jurisprudence.

A. The Ruling Below Contravenes Sears Roebuck & Co

In *Sears, Roebuck & Co.*, 436 U.S. 180, 183,187-188, 201-202 (1978), this Court recognized two prerequisites to *Garmon's* application: (1) an agency with jurisdiction over the parties' controversy; and (2) an ability on the part of a litigant either himself to invoke or induce his opponent to invoke its jurisdiction. *Id.* Put even more simply, for *Garmon* to apply, there must be an agency to which the specific controversy or claims could have been submitted.

There is no such agency here. This is so whether one accepts the thesis posited by the Courts below - i.e., that the "UC Claims" concern conduct actually or arguably protected or prohibited by the RLA- or whether, as *Belknap v. Hale*, 463 U.S. 491, 510 (1983), suggests is appropriate, one examines the character of the claims more closely.

1. There is No RLA Agency With Jurisdiction Over Statutory Claims

Even assuming plaintiffs' "UC claims" could arguably be characterized as stating violations of the Railway Labor Act, this Court has made it unmistakably clear that, under the RLA, statutory violations are not consigned to any agency. *See Communications Workers v. Beck*, 487 U.S. 735, 743 (1988) ("Unlike the NLRA, the RLA establishes no agency charged with administering its provisions, and instead leaves it to the courts to determine the validity of activities challenged under the Act").

2. There Is No RLA Agency With Jurisdiction Over DFR Claims Or Violations Of A Union's Constitution

Three state-law claims are still at issue in the lawsuit. Claim Eleven seeks damages against the Union for having violated its members' balloting and ratification rights under its Constitution and Bylaws. Claims Twelve and Sixteen seek damages against the Carrier for having intentionally interfered with the union-member contract.

The Second Circuit characterized these claims as being "identical to" or "in substance, identical to ... DFR ... claims" and therefore, arguably an RLA violation. (Pet. App. 31 n.6, 32 n.8). Petitioners characterized them as traditional claims in contract and tort for the violation of rights under a union constitution.[21]

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[21]The fact that the "UC" and "DFR" claims arise out of the same nucleus of operative fact does not make them "identical" or "in substance, identical." (But see Pet. App. 32n.8). In their DFR claims, Petitioners sought to prove that the Union had acted in bad faith. In their "UC Claims," Petitioners sought to prove that the Union had violated specified provisions of its Constitution.

Specifically, they sought to prove, *among other things*, that:

1) APFA set up an electronic voting system that did not satisfy the requirement of APFA's Constitution that a vote or referendum be "secret." (The system it set up utilized two numbers neither of which was secret: The first consisted of employees' ID numbers- known to both APFA and Airline- and publicly emblazoned on each employee's work badge. (JA 2429 ¶121-122; Pet.App. 60). The second (the PINs) were assigned sequentially, by base, **in alphabetical order.** Any flight attendant with access to a list of attendants flying out of his or her base, and knowledge of his own PIN, could easily ascertain the PIN of *every* other potential voter. (JA 1738-2409; JA 2429 ¶123). Using these two numbers, anyone's ballot could be accessed on a computer. (JA1743-4).

2) while the balloting was underway, APFA and Airline both monitored the vote, in further violation of the secrecy requirement, (Pet. App. 26);

3) probably as a result of information gleaned from the monitoring, they made changes to the proposed agreement *while it was being voted on.* (This violated the Constitutional provision requiring that the membership "be given the complete changes to ... [the] Collective Bargaining Agreement ... *prior to or at the start* of the balloting period." (Pet. App. 87, 93, 103). (Because of these changes, different people voting on different days voted on different proposed agreements.

Whether these claims are viewed as, "in substance, identical to DFR claims" or as distinct claims for violations of rights under a contract, it remains clear that there is no RLA agency to which they could have been submitted.

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4) when, an hour or two before the voting was scheduled to close, it became apparent that the agreement was nonetheless going to be rejected, Airline and APFA's leadership met and agreed what to do (JA 1482-3; JA 2426-7 ¶¶99-100, JA 1607-9)

5) consistent with this agreement, APFA directed the American Arbitration Association to re-open the vote, accept additional ballots and permit already-cast ballots to be changed. (The Constitution provided that ballots cast or received after the date and time specified on the ballot were "void." (JA 1467; Art.VI.5.E, Art.XI.I.E.2, Art.IX.6.A.4) It also required that "valid ballots" be counted. (*Id.*; Art. III.1.B; Art.IX.1.D-F-G; JA1565-6 Art.VI.5.K; Art.VI.4). Both provisions were violated.)

6) during the extension, Company went to extraordinary lengths to pressure flight attendants to vote, or change their votes to "Yes." So pervasive was company interference that APFA wrote the Company, demanding "BACK OFF AND STAY OUT OF OUR VOTING PROCESS." Company ignored APFA's protests. (JA 2427-8 ¶¶111-17, JA 1371; JA 1612; JA 1545; JA 1461; JA 1182-87; JA9 58-59; JA 823-24; JA 852-54; JA 3681; JA 482-90; JA1187);

7) because of the Company's actions during the extension and its withholding of information regarding executive bonuses and perks, on 4/22/03, APFA's Board of Directors determined that the ratification vote had been *"tainted"* and *formally* set it aside. (JA 1469-72). It directed that a new vote be conducted in accordance with its Constitution and announced the new vote to the membership. *Id.*

8) three days later, APFA cancelled the new vote and, despite its lack of authority to do so under its Constitution, signed an agreement with the Company. (JA 1479-81; JA 1537-42; Pet. App. 65-66), thereby depriving the membership of the ratification vote the Union Constitution mandated. (JA 1467, Art.III.2.A; Art.XI.1).

Ten circuits have interpreted *Garmon* as have Petitioners, requiring the preemption decision to be made with a scalpel, not a hatchet. The test is not whether a vast area of disputes is covered by the Act, but whether a specialized agency has been charged with resolving the specific controversy presented to the court.[22]

B. The Ruling Below Contravenes This Court's Decisions In Davis, Belknap And An Unbroken Line of Precedents

In an effort to avoid the problem posed by the absence of any agency to defer to, the Second Circuit has attempted to recast *Garmon* as a "choice-of-law" rule, the objective of which is to determine whether a particular state law might "'stand[] as an obstacle to

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[22]These Circuits only apply *Garmon* to preempt state-law claims where the controversy presented by them is "identical to one which could have been brought before the NLRB." *See, e.g., E.I. Dupont de Nemours & Co. v. Sawyer*, 517 F.3d 785 (5th Cir. 2008); *Felix v. Lucent Technologies*, 387 F.3d 1146, 1165-1166 (10th Cir. 2004), *cert. den'd*, 545 U.S. 1149 (2005); *Pace Industries v. NLRB*, 118 F.3d 585, 589 (8th Cir. 1997), *cert. den'd*, 523 U.S. 1020 (1998); *Tamburello v. Comm Tract Corp.*, 67 F.3d 973, 980-981 (1st Cir. 1995), *cert. den'd*, 517 U.S. 1222 (1996); *Loewen Group v. Haberichter*, 65 F.3d 1417, 1425-1426 (7th Cir. 1995); *Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1178-1179 (D.C.Cir. 1993), *cert. den'd*, 511 U.S. 1003 (1994); *Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654, 659-660 (7th Cir. 1992); *Platt v. Jack Cooper Transport*, 959 F.2d 91 (8th Cir. 1992); *Parker v. Connors Steel*, 855 F.2d 1510, 1516-1518 (11th Cir. 1988), *cert. den'd*, 490 U.S. 1066 (1989); *Serrano v. Jones & Laughlin*, 790 F.2d 1279, 1288 (6th Cir. 1986); *Sheet Metal Workers Int'l v. NLRB*, 716 F.2d 1249, 1263 (9th Cir. 1983); *United Credit Bureau of America v. NLRB*, 643 F.2d 1017, 1025-1026 (4th Cir. 1981), *cert. den'd*, 454 U.S. 994 (1981).

the accomplishment and execution of the full purposes and objectives of Congress." (Pet. App. 20). It then attempts to meet that test by recasting Petitioners' "UC Claims" as claims that concern "conduct central to Congress's RLA goals" and "core RLA conduct." (Pet. App. 22).

In each respect, the ruling below conflicts with both this Court's decisions and the decisions of other Circuits. Not only are activities related to contract ratification far from the "core" of the RLA, they are outside its parameters entirely. *See, e.g., DeBoles v. Trans World Air Lines, Inc.*, 552 F.2d 1005, 1018 (3d Cir. 1977), *cert. den'd*, 434 U.S. 837 (1977)(it is because federal labor statutes do not address the question that the ratification of contracts is only required "if the union constitution or by-laws require it"); *White v. White Rose Foods*, 237 F.3d 174, 182 (2d Cir. 2001).

Equally to the point, *Garmon* is not a "conflict-of-law" rule. As this Court has made unmistakably clear, *Garmon* presents a "choice-of-forum rather than a choice-of-law question." *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 381 n.9 (1986). Its purpose is to ensure that claims that should be submitted to the NLRB *are* submitted there, and it achieves that purpose by precluding other tribunals from exercising their jurisdiction. *See, e.g., Marquez v. Schreen Actor's Guild*, 525 U.S. 33, 49 (1998); *Golden Gate Trans. Corp. v. City of Los Angeles*, 493 U.S. 103, 111 n.7 (1989); *Beck*, 487 U.S. at 742; *Longshoremen v. Davis*, 376 U.S. 380, 391, 393 n.10 (1986); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985); *Brown v. Hotel Employees*, 468 U.S. 491, 502-03 (1984); *Sears, Roebuck, supra*; *Jacksonville Terminal*, 394 U.S. at 382 n. 17;

Local 174, Teamster, Chauffeurs & Warehousemen v. Lucas Flour, 369 U.S. 95, 102 (1962); *Garmon*, 350 U.S. 236 (1959). Whether *Garmon* actually deprives them of "subject matter" jurisdiction or is simply a claims-processing rule is a question that need not detain us. In either event, its principal purpose and effect is to redirect litigants from one forum to another and not, as the Courts below believed, to require courts to *themselves* undertake an in-depth analysis of the interplay between state and federal law. The whole point of *Garmon* is that the task of evaluating and articulating the law is to be left to the specialized agency.

It follows that it makes absolutely no sense to apply *Garmon*, as the Courts did below, to circumstances in which the judicial forum is the *only* forum available. It cannot protect the jurisdiction of any forum under those circumstances; it can only deprive litigants of *any* forum for their claims.

C. On The Issue Of RLA Preemption, The Circuits Are Not Simply Divided They Are In Considerable Disarray.

There is no longer either unanimity or clarity on the question of which of this Court's decisions to apply in determining RLA preemption. Over the past ten years, there has been increasing divergence on the issue. *See, e.g., Lindsay*, Pet. App. 1-33 (2d Cir. 2009)(*Garmon* standard); *Wisconsin Cent. Ltd. v. Shannon*, 539 F.3d 751 (7th Cir. 2008)("field preemption"); *Bloemer v. Northwest Airlines, Inc.*, 401 F.3d 935 (8th Cir. 2005)(*Norris/Lingle* standard); *Bensel v. Allied Pilots' Ass'n*, 387 F.3d 298, 321 (3rd Cir.

2003)(*Garmon*); *McCormick v. Aircraft Mech. Fraternal Ass'n*, 340 F3d 642, 644-45 (8th Cir. 2003)(*Norris/Lingle*); *Kaufman v. Allied Pilots Ass'n*, 274 F.3d 197 (5th Cir. 2001), *cert. den'd*, 535 U.S. 1034 (2002)(*Garmon* applied to preempt passengers' claims against union for damages resulting from job actions); *Air Transp. v. City & County of San Francisco*, 266 F.3d 1064, 1076 (9th Cir. 2001)(*Norris/Lingle*; *Machinists*); *Adames v. Executive Airlines, Inc.*, 258 F.3d 7 (1st Cir. 2001)(*Norris/Lingle*); *Brown v. Illinois Central*, 254 F.3d 654 (7th Cir.), *cert. den'd*, 534 U.S. 1041 (2001)(applies *Norris/Lingle* in preclusion context); *Fairbairn v. United Air Lines*, 250 F.3d 237 (4th Cir. 2001)(utilizing *Norris/Lingle* analysis, Circuit finds that RLA doesn't preempt claims arising under individual employment contracts); *Ertle v. Continental Airlines, Inc.*, 136 F.3d 690 (10th Cir. 1998)(*Norris*); *Espinal v. Northwest Airlines*, 90 F.3d 1452 (9th Cir. 1996)(*Norris/Lingle*); *Pyles v. United Airlines*, 79 F.3d 1046, 1050 (11th Cir. 1996)(*Norris/Lingle*); *Hirras v. Nat'l R.R. Passenger Corp.*, 44 F.3d 278 (5th Cir. 1995)(*Norris/Lingle*); *Henegar v. Banta*, 27 F.3d 223, 226-227 (6th Cir.), *cert. den'd*, 513 U.S. 1057 (1994)(*Norris/Lingle*).

D. This Court's Intervention Is Necessary To Restore Order On This Issue. The Consequences Of Permitting This Circuit Split To Persist Are Dramatic And Dangerous.

In the final analysis, the decision below reads a preemption provision into the RLA that is not there in order to protect the jurisdiction of an agency that does not exist. It also alters traditional preemption analysis

by measuring the preemptive scope of one statute (the RLA) by the Congressional intent of a very different one (the NLRA). It then ignores the two prerequisites, established by myriad decisions of both this Court and ten sister Circuits, for applying the NLRA rule. Finally, it dispenses entirely with the third tier of the preemption analysis, stating, "actual conflict is not a prerequisite to finding a state claim preempted by the RLA." (Pet. App. 23).

As a practical matter, left to stand, the preemption doctrine applied below would radically affect employees' rights. **It would deprive employees covered by the Railway Labor Act of a right all other employees have: the right to enforce their union constitution.** Like the ruling on standing, the decision below on preemption means that employees covered by the RLA essentially have **no forum- state or federal, administrative or judicial- for the kind of claims raised here.** All they have is an illusory right to attempt to prove their union has been "wholly irrational." Should a court permit them to reach a jury on that claim, they would then have the right to attempt to obtain an uncollectible judgment.

Because here the Union Constitution clearly gave its members contract ratification and balloting rights, the Union abrogated its provisions, and the Airline contributed to and/or caused its breach, none of Petitioners' state-law claims is preempted. These claims are not covered by the RLA's lone and very limited express preemption provision, 45 U.S.C. § 152 Eleventh. The "field" they occupy- i.e., the field of internal union-employee relations- has not been "occupied" by the Railway Labor Act. And, as the

Second Circuit has tacitly acknowledged, there is no "actual conflict" between the "UC Claims" and any relevant federal law. (Pet. App. 23, 31n.6, 32n.8). They do not conflict with the RLA's substantive provisions, with DFR law, or the jurisdiction of any agency. To the contrary, they clearly fall outside *Norris/Lingle* since they do not require the interpretation of a collective bargaining agreement.

CONCLUSION

This case presents an ideal vehicle to resolve not only significant issues of statutory interpretation under the RLA, but issues of preemption at the heart of our federal system and the interpretation of Article III standing principles in the context of labor unions and their members. In addition to resolving contradictory rulings from different circuits and establishing a uniform set of principles for all to follow, the resolution of these issues would be of enormous practical importance to millions of working men and women and their families, as well as unions and employers under both the RLA and NLRA.

Petitioners respectfully request that the Court grant certiorari on all questions presented.

Respectfully submitted,

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(any footnotes trail end of each document)
08-4122-cv (L), 08-4128-cv (con), 08-4130-cv (con)
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JILL LINDSAY, individually and on behalf of all others similarly situated, CAROL JOHNSON, CONSTANCE LAMATTINA, DANIEL SANTIAGO, DEBORAH WHITTINGTON, DOTTIE LONG, JANET GOLD, JUDITH ALEXANDER, KAREN RIVOIRA, LAURENCE E. SALOMON III, PATRICIA KENNEDY, PATTY GENTRY, REBECCA SMITH, Plaintiffs-Appellants,

-- v.--

ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, a business entity of unknown type, AMR CORPORATION, a Delaware corporation, also known as American Airlines, AMERICAN AIRLINES, INC., also known as American Eagle, and JOHN WARD, Defendants-Appellees.

July 6, 2009, Argued
September 21, 2009, Decided

COUNSEL: EMILY M. BASS, Brooklyn, New York (Steven M. Nachman, New York, New York; Michael S. Haber, New York, New York; Martin Garbus, Davis & Gilbert, New York, New York, on the brief), for Plaintiffs-Appellants.

For STEPHEN B. MOLDOF (Michael L. Winston, Travis M. Mastroddi, on the brief), Cohen, Weiss and Simon LLP, New York, New York, for Defendants-

Appellees Association of Professional Flight Attendants and John Ward.

For THOMAS E. REINERT, JR. (Jonathan C. Fritts, on the brief), Morgan, Lewis & Bockius LLP, Washington, D.C., for Defendants-Appellees American Airlines, Inc. and AMR Corporation.

JUDGES: Before: RAGGI, HALL, Circuit Judges, and BIANCO, District Judge. *

REENA RAGGI, *Circuit Judge*:

Plaintiffs Jill Lindsay, Carol Johnson, Constance LaMattina, Daniel Santiago, Deborah Whittington, Dottie Long, Janet Gold, Judith Alexander, Karen Rivoira, Laurence E. Salomon III, Patricia Kennedy, Patty Gentry, and Rebecca Smith, proceeding individually, and in Ms. Lindsay's case, also on behalf of a putative class of flight attendants, filed suit in the United States District Court for the Eastern District of New York (Nina Gershon, *Judge*), challenging the validity of a Restructuring Participation Agreement reached between their former employer, defendants American Airlines and its parent AMR Corporation (collectively, "American Airlines"), and their union, defendant Association of Professional Flight Attendants, and its former president defendant John Ward (collectively, "APFA" or the "union"). Plaintiffs now appeal an award of summary judgment entered on July 22, 2008, in favor of American Airlines on plaintiffs' claims under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 et seq.; in favor of American Airlines and APFA on plaintiffs' state law claims; and in favor of APFA on plaintiffs' claim of a breach of the duty of fair

representation. We conclude that plaintiffs' challenge fails because (1) the statutory sections relied on by plaintiffs to support their RLA claim, 45 U.S.C. § 152, First and Seventh, do not provide for a private cause of action; (2) the RLA preempts plaintiffs' state law claims; and (3) plaintiffs failed to adduce sufficient evidence of a material fact on their fair representation claim to defeat summary judgment.

Accordingly, we affirm the judgment of the district court in favor of defendants.

I. Background

The district court's thorough opinion fairly chronicles the complex events giving rise to defendants' Restructuring Participation Agreement, which plaintiffs challenge in this action. See *Marcoux v. Am. Airlines, Inc.*, F. Supp. 2d , 2006 U.S. Dist. LEXIS 14130, 2006 WL 842888 (E.D.N.Y. 2006). We assume familiarity with that opinion, and we do not ourselves repeat the facts except as necessary to discuss plaintiffs' appeal of the award of summary judgment.

II. Discussion

A. Standard of Review

We review an award of summary judgment de novo, "construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor." *SCR Joint Venture L.P. v. Warshawsky*, 559 F.3d 133, 137 (2d Cir. 2009). Summary judgment may be granted only "if the pleadings, the discovery and disclosure materials on

file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. A fact is material if it might affect the outcome of the suit under the governing law." *SCR Joint Venture L.P. v. Warshawsky*, 559 F.3d at 137.

B. Plaintiffs' Railway Labor Act Claims

Plaintiffs contend that American Airlines violated those provisions of the RLA codified at 45 U.S.C. § 152, First and Seventh by supplanting an existing collective bargaining agreement with the Restructuring Participation Agreement. Section 152, First states as follows:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152, First.

Section 152, Seventh states as follows:

> No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its

> employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Id. § 152, Seventh.

No party has pointed us to any case law addressing whether these sections provide for a private right of action by individual employees, nor have we identified any. In considering this question of first impression, we begin by reviewing the general enforcement structure of the RLA.

1. Arbitral Resolution of Major and Minor Disputes Under the RLA

"The Railway Labor Act was passed in 1926 to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce." *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 148, 90 S. Ct. 294, 24 L. Ed. 2d 325 (1969); see also 45 U.S.C. § 181 (amending RLA to apply to interstate air carriers). Toward this end, the RLA provides an arbitral mechanism for "the prompt and orderly settlement" of two classes of disputes between unions and employers. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252, 114 S. Ct. 2239, 129 L. Ed. 2d 203 (1994) (quoting 45 U.S.C. § 151a). The first class, referred to as "major" disputes, relates to "the formation of collective [bargaining] agreements or efforts to secure them." *Consolidated Rail Corp.* v. *Ry. Labor Executives' Ass'n*, 491 U.S. 299, 302, 109 S. Ct. 2477, 105 L. Ed. 2d 250 (1989) (internal quotation marks omitted). The second class, known as "minor" disputes,

see *id.* at 303, "grow[s] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions," 45 U.S.C. § 151a(5). In other words, "major disputes seek to create contractual rights, minor disputes to enforce them." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. at 253.

2. Private Enforcement of the RLA

Beyond the arbitral scheme for resolving disputes between employers and unions, the RLA also provides for federal criminal enforcement. See 45 U.S.C. § 152, Tenth ("It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section."). Although the RLA does not explicitly provide a private civil cause of action, the Supreme Court has found such an action by a union implicit in the statutory scheme.

In Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steam ship Clerks, the Supreme Court recognized a private right of action by a union alleging that the defendant company was "interfering with, influencing, or coercing the clerical employees of the railroad company in the matter of their organization and designation of representatives" in violation of § 152, Third. 281 U.S. 548, 555, 50 S. Ct. 427, 74 L. Ed. 1034 (1930). The Court concluded that "Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employees, thought

it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings." *Id.* at 567. In fact, private civil proceedings constitute the bulk of cases arising under the RLA. See *United States v. Winston*, 558 F.2d 105, 108 & n.3 (2d Cir. 1977) (noting "[t]he paucity of criminal proceedings under § 152, when contrasted with the active pursuit of civil relief thereunder").

Although much of the case law involving private causes of action under § 152 concerns claims brought by or against a certified union, our sister circuits have recognized an implied private right of action for individual employees against their employer under certain RLA provisions, notably § 152, Third and Fourth. See, e.g., *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 318 (3d Cir. 2004) (collecting cases); *Fennessy v. Sw. Airlines*, 91 F.3d 1359, 1362-64 (9th Cir. 1996); *Stepanischen v. Merchs. Despatch Transp. Corp.*, 722 F.2d 922, 927 (1st Cir. 1983). The Third Circuit explained that "[i]mplying a private cause of action for individual employees under 45 U.S.C. § 152, Third & Fourth is appropriate given that those sections prohibit carriers from discriminating against employees in connection with union organizing activities."[1] *Bensel v. Allied Pilots Ass'n*, 387 F.3d at 318 (emphasis in original). By contrast, the Third Circuit declined to find an implied private cause of action for individual employees in § 152, Second and Ninth because, although the statute "may indicate a congressional intent to create a private cause of action for a duly certified representative that is injured pursuant to these provisions," that "does not imply that Congress intended to create a private right of action for any

group or groups of individual employees claiming to act on behalf of the relevant employees."[2] *Id.* at 319.

3. Section 152, First and Seventh Do Not Provide a Private Cause of Action

Against this background, we consider whether § 152, First or Seventh provides an individual employee with a private right of action against his employer. Because our task is to ascertain Congress's intent, we look first to the text and structure of the statute. See *Alexander v. Sandoval*, 532 U.S. 275, 286-87, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). If Congress has manifested no intent to provide a private right of action, we cannot create one. See id. We identify nothing in the RLA's text or structure suggesting Congress's intent to create a private remedy. We next proceed to consider "whether a private remedy is implicit in [the] statute." *Cort v. Ash*, 422 U.S. 66, 78, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975). In undertaking this second inquiry, four factors guide our analysis:

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted - that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. (internal citations and quotation marks omitted).[3] For the reasons stated in the next three subsections of this opinion, we conclude that Congress did not intend to create a private cause of action for employees to enforce § 152, First or Seventh. The appropriate remedy for injuries of the sort plaintiffs allege is a claim against their union for breach of the duty of fair representation.[4]

a. Text and Structure

The text of § 152, First and Seventh reveals no congressional intent to create a private right of action. "Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Alexander v. Sandoval*, 532 U.S. at 289 (internal quotation marks omitted); see also *Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 116 (2d Cir. 2007) ("[T]he absence of 'rights-creating language' indicates a lack of congressional intent to create private rights of action."). Section 152, First imposes a "duty" on "all carriers, their officers, agents, and employees." Likewise, § 152, Seventh bars certain actions by a "carrier, its officers, or agents." Because both provisions focus on the regulated parties, we discern no intent to confer privately enforceable rights.

The statute's structure also supports this conclusion. As the Supreme Court has recognized, "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander v. Sandoval*, 532 U.S. at 290. Here, Congress expressly contemplated that the RLA would be enforced through arbitral panels, see 45 U.S.C. § 184,

and criminal prosecution, see 45 U.S.C. § 152, Tenth.[5] Congress's failure to provide similarly for private enforcement signals caution in inferring any such right of action. The prior implication of private rights under other subsections of 45 U.S.C. § 152 warrants no different conclusion. Indeed, Sandoval involved Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. In an earlier Title VI case, the Court had noted that private plaintiffs could sue under § 601. See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694-96, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979). Nevertheless, that consideration was not relevant to Sandoval's textual and structural analysis of whether § 602 created a similar private remedy. We therefore conclude that the RLA's text and structure does not manifest Congress's intent to create a private enforcement mechanism for all provisions of the statute.

b. Section 152, First

Our analysis of the four Cort v. Ash factors bolsters this conclusion. The statutory requirement in § 152, First that carriers strive to "maintain agreements concerning rates, rules, and working conditions," may well benefit individual employees, the first relevant factor under *Cort v. Ash*, 422 U.S. at 78. This is not sufficient, however, to imply a private right of action because the statutory scheme achieves its purpose by collectivizing employees' individual interests. See *NLRB v. Allis-Chalmers Mfg. C o.*, 388 U.S. 175, 180, 87 S. Ct. 2001, 18 L. Ed. 2d 1123 (1967) (noting that "majority-rule concept is today unquestionably at the center of our federal labor policy" (internal quotation marks omitted)). Thus, § 152, First is distinguishable from § 152, Third and Fourth, for which private rights

of action have been recognized, in that the latter provisions are specifically aimed at preventing employer interference with individual employees' ability to join a collective bargaining scheme. With that interest protected, however, Congress clearly intended that individual preferences give way to the collective position embodied by the certified union representative. It is agreements reached by such representatives with employers that are the focus of § 152, First. See *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 548, 57 S. Ct. 592, 81 L. Ed. 789 (1937) (observing that § 152, First is concerned with negotiations between an employer and the "authorized representative of its employees").

Indeed, the second Cort v. Ash factor signals that Congress did not intend to provide a private cause of action for individual employees in § 152, First. See 422 U.S. at 78. Section 152, Second states that "[a]ll disputes between a carrier . . . and its . . . employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier . . . and by the employees thereof interested in the dispute." 45 U.S.C. § 152, Second (emphasis added). Section 152, Fourth explains that the very "right to organize and bargain collectively" is accomplished "through representatives of [the employees'] own choosing." 45 U.S.C. § 152, Fourth (emphasis added). That provision further states that "[t]he majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter." Id. Taken together, these provisions leave no doubt that, where, as here, a "craft or class of

employees" has selected a representative union, Congress intended the power to "make" and the duty to "maintain agreements concerning rates of pay, rules, and working conditions," id. § 152, First, to run between the representative union and the company. Indeed, the Supreme Court has explained that "members [of a craft or class] cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining." *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 200, 65 S. Ct. 226, 89 L. Ed. 173 (1944); see also *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. at 548.

Relatedly, we conclude under the third *Cort v. Ash* factor that it would not be consistent "with the underlying purposes of the legislative scheme" to imply a private cause of action for employees under § 152, First. By its terms, § 152, First links its requirement to make and maintain agreements to the larger RLA purpose "to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U.S.C. § 152, First; see also id. § 151a(1). As described above, the statute seeks to achieve this goal by vesting collective bargaining authority in representative unions. The Supreme Court has explained that, in enacting the RLA, "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, but it has also imposed on the representative a corresponding duty." *Steele v. Louisville & N.R. Co.*, 323 U.S. at 202. As such, the RLA is consistent with a

> [n]ational labor policy . . . built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.

NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. at 180. The union's ability to exercise this vested authority is protected by the RLA. At the same time, it is the union's "corresponding duty" to those it represents that ensures the fair exercise of this authority. *Steele v. Louisville & N.R. Co.*, 323 U.S. at 202. It could not be otherwise in a statutory regime that prioritizes continuity and "majority-rule" over the "complete satisfaction of all who are represented." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. at 180.

The facts of this case demonstrate why individual employee actions under § 152, First would be inconsistent with a statutory scheme embodying these principles. The Restructuring Participation Agreement, which plaintiffs complain fails to maintain a 2001 collective bargaining agreement ("CBA"), was agreed to by APFA on April 8, 2003, and approved by APFA 's members on April 16, 2003. In that document, "the parties agree that the 2001 CBA shall remain in full force and effect except as modified herein." Among the modifications here at issue was the date for possible amendment of the CBA, with the union and its

membership agreeing to an extension from November 30, 2004, to April 30, 2009. Following the disclosure of the Special Executive Retirement Plan on April 17, 2003, the union extracted a concession from American Airlines on the point, making the 2001 CBA amendable one year earlier, on April 30, 2008.

However dissatisfied individual employees may be with these modifications to the 2001 CBA, allowing them to sue American Airlines under § 152, First to set aside a Restructuring Participation Agreement agreed to by their union representative and ratified by the union membership would risk the very disruption in commerce that the RLA seeks to avoid. Indeed, under the agreed-to modifications, American Airlines cannot simply revert to the original terms of the 2001 CBA. Plaintiffs' dispute is thus not with American Airlines, which could not take the action plaintiffs seek without violating the modified CBA, but rather with the union, which negotiated for the modified CBA terms that now bind American Airlines and that form the basis of plaintiffs' claim. A claim of this nature is appropriately brought against the union for breach of the duty of fair representation. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. at 181 ("It was because the national labor policy vested unions with power to order the relations of employees with their employer that this Court found it necessary to fashion the duty of fair representation."); see also infra [25-31] (discussing plaintiffs' duty of fair representation claim).

c. Section 152, Seventh

The statutory provision prohibiting carriers from changing "rates of pay, rules, or working conditions"

except as prescribed by agreement or statute, 45 U.S.C. § 152, Seventh, may also benefit employees, but here too we do not recognize an implied private right of action by individual employees against an employer.

As the Supreme Court has observed, the purpose of § 152, Seventh is twofold: "it operates to give legal and binding effect to collective agreements, and it lays down the requirement that collective agreements can be changed only by the statutory procedures." *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. at 156. Thus, § 152, Seventh is a "status quo" provision, requiring "that parties to a CBA governed by the RLA maintain objective working conditions during the pendency of any dispute arising under (or during the re-negotiation of) their CBA." *In re Nw. Airlines Corp.*, 483 F.3d 160, 167 (2d Cir. 2007). More specifically, in the event of a "major dispute," § 152, Seventh preserves the status quo while the employer and the union engage in the negotiation required by 45 U.S.C. §§ 155 and 156. See *Consolidated Rail Corp. v. Ry. Labor Executives Ass'n*, 491 U.S. at 302-03.

Precisely because the statutory scheme as interpreted by the courts recognizes the representative union as the proper party to invoke § 152, Seventh, we conclude that the second and third Cort v. Ash factors weigh heavily against recognition of a private right of action by individual employees. See 422 U.S. at 78. The provision is only implicated where a "craft or class" of employees has already selected a representative to bargain collectively on its behalf, 45 U.S.C. § 152, Fourth, and where an employer attempts to make changes that affect the employees "as a class," § 152, Seventh. Under those circumstances, an individual

employee's "power to order his own relations with his employer" is "extinguishe[d]" in favor of "a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. at 180.

Because we conclude that neither § 152, First nor § 152, Seventh provides a private cause of action to individual employees against their employers under the circumstances presented here, we affirm the district court's dismissal of these claims and its entry of judgment in favor of defendants.

C. Plaintiffs' State Law Claims

Plaintiffs assert that the district court erred in concluding that their state law claims against American Airlines were preempted by the RLA. See *Marcoux v. Am. Airlines, Inc.*, F. Supp. 2d , 2006 U.S. Dist. LEXIS 14130, 2006 WL 842888, at *7. In their reply brief, plaintiffs clarify that they appeal only the dismissal of (1) Claim Eleven, in which they charge APFA with breach of its contractual relationship with plaintiffs as set forth in the union's constitution and bylaws; (2) Claim Twelve, in which they charge American Airlines with intentional interference with the contractual relationship between APFA and its members; and (3) Claim Sixteen, in which plaintiffs charge American Airlines with intentionally causing APFA to breach certain provisions of its constitution and bylaws relating to balloting and electioneering practices. Accordingly, we limit our discussion to those claims. See *Maloney v. Cuomo*, 554 F.3d 56, 58 n.2 (2d Cir. 2009) (noting that claims not pursued on appeal are deemed waived). Like the district court, we conclude

that these claims are preempted by the RLA, and we therefore affirm their dismissal.

1. Preemption in Labor Cases Generally

The Supreme Court established the basic tenets of federal preemption in the labor context in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959). In Garmon, the Court considered whether California could provide damages under state law to an employer based on employee picketing, which the California Supreme Court determined was an unfair trade practice. See *id.* at 238-39. The employer had begun a simultaneous proceeding before the National Labor Relations Board ("NLRB"), over which the Regional Director had declined to exercise jurisdiction "presumably because the amount of interstate commerce involved did not meet the Board's monetary standards in taking jurisdiction." *Id.* at 238.

The Court identified the issue as "[t]he extent to which the variegated laws of the several States are displaced by a single, uniform, national rule," namely, the National Labor Relations Act. *Id.* at 241. The Court concluded as follows:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations A ct, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of

> conflict between power asserted by Congress and requirements imposed by state law.

Id. at 244. Stated differently, "[t]he governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." *Id.* at 246. This principle, the Court explained, applies regardless of whether the state law at issue was "tort law of general application [or] specialized labor relations statutes." *Id.* at 244 n.3. Finally, the Court explained that, even if application of state law in a particular situation would not, in fact, conflict with "the active assertion of federal authority," it would nevertheless "involve[] a conflict with federal policy in that it involves allowing two law-making sources to govern." *Id.* at 247.

The Garmon rule is subject to two exceptions. First, states retain power to regulate activity that is "a merely peripheral concern of the Labor Management Relations Act." *Id.* at 243. Second, federal labor law does not preempt state law where "the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] could not infer that Congress had deprived the States of the power to act." *Id.* at 244. As an example of the second exception, the Court pointed to states' continued ability to regulate "violence and imminent threats to the public order." *Id.* at 247.

2. Preemption in RLA Cases

Although Garmon was decided in the context of the National Labor Relations Act, similar reasoning animated the Supreme Court's application of preemption to the Railway Labor Act in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 89 S. Ct. 1109, 22 L. Ed. 2d 344 (1969); see, e.g., *Bensel v. Allied Pilots Ass'n*, 387 F.3d at 321 (suggesting that Garmon was "extended" to the RLA in Jacksonville Terminal). In Jacksonville Terminal, the Court considered whether, in the context of a "major" labor dispute governed by the RLA, a Florida court had the authority to enjoin the picketing of a freight rail terminal facility under state tort and labor laws. 394 U.S. at 372-77. The Court concluded that it did not because "the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the [RLA's] processes." *Id.* at 380. The Court reached this conclusion even while acknowledging that, unlike the situation presented in Garmon, in a major dispute under the RLA there is "no administrative agency equivalent to the NLRB with jurisdiction over railway labor disputes." *Id.* at 384 n.19.

In the years since Jacksonville Terminal and Garmon were decided, this and other circuits have applied their reasoning to major RLA disputes, see, e.g., *Bensel v. Allied Pilots Ass'n*, 387 F.3d at 320-23 (applying Garmon and Jacksonville Terminal to RLA major dispute and affirming dismissal of, inter alia, tortious and malicious interference, fraudulent misrepresentation, and breach of contract claims); to minor RLA disputes, see, e.g., *Beers v.S.Pac. Transp. Co.*, 703 F.2d 425, 428-29 (9th Cir. 1983) (holding that intentional infliction of emotional distress claim brought in context of "minor" RLA dispute was preempted

under Garmon); and to RLA issues, like those presented here, not falling squarely within either category, see, e.g., *Kaufman v. Allied Pilots Ass'n*, 274 F.3d 197, 202-03 (5th Cir. 2001) (applying Garmon to hold third-party tortious interference claim preempted by RLA); *Air Transp. Ass'n of Am. v. City & County of San Francisco*, 266 F.3d 1064, 1076 (9th Cir. 2001) (noting that "[s]tate laws that frustrate the purpose of the RLA are preempted"); *Peterson v. Air Line Pilots Ass'n, Int'l*, 759 F.2d 1161, 1170-71 (4th Cir. 1985) (holding that RLA preempts state law claim for wrongful discharge even where RLA arbitral mechanism not implicated because "state claims seek to vindicate rights largely secured by federal law"); cf. *Delta Air Lines v. Kramarsky*, 650 F.2d 1287, 1301-02 (2d Cir. 1981) (applying Garmon analysis to claim that New York Disability Benefits Law ("DBL") was preempted by RLA, and holding that because DBL "governs matters outside the intended reach of the RLA . . . the RLA therefore does not preempt the DBL"), vacated in part on different grounds on rehearing by 666 F.2d 21, 26 (2d Cir. 1981), affirmed in part and vacated in part on other grounds by *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 92 n.8, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983) (noting that Second Circuit resolved RLA preemption claim against Delta, but that claim was not before Supreme Court).

Contrary to plaintiffs' assertion, these cases demonstrate that the principles animating *Garmon*, *Jacksonville Terminal*, and their progeny are applicable to plaintiffs' state law claims. Underlying these principles is a concern with whether the particular state law at issue may "stand[] as an obstacle to the accomplishment and execution of the full

purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941). Accordingly, courts have invoked Garmon to preempt certain state law causes of action even where the RLA claim at issue is not subject to the exclusive primary jurisdiction of the National Railroad Adjustment Board ("NRA B"). See 45 U.S.C. § 153; *Pennsylvania R.R. Co. v. Day*, 360 U.S. 548, 552, 79 S. Ct. 1322, 3 L. Ed. 2d 1422 (1959) (discussing exclusive primary jurisdiction of NRAB over minor RLA disputes). Similarly, courts have applied Jacksonville Terminal to preempt more than just those state law claims that attempt "to regulate economic warfare between disputants subject to the [RLA's] processes." See *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 380. Although expansive views of the preemption doctrine have not escaped criticism, see *Wyeth v. Levine*, 129 S. Ct. 1187, 1211, 173 L. Ed. 2d 51 (2009) (Thomas, J., concurring), we need not here reach the outer boundaries of the doctrine to conclude that the maintenance of plaintiffs' state tort claims "would frustrate effective implementation of the [RLA's] processes." *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 380.

3. Claims Eleven, Twelve, and Sixteen Are Preempted by the RLA

Claims Twelve and Sixteen allege that actions of American Airlines in negotiating the Restructuring Participation Agreement caused APFA to breach its contractual duties to its members, see Compl. ¶¶ 304-07, 325-35, while Claim Eleven alleges that APFA breached its contract with its members in the course of negotiating and ratifying the Restructuring

Participation Agreement, see id. ¶ ¶ 299-303. These claims are akin to those discussed by the Third Circuit in Bensel v. Allied Pilots' Association:

> [A]ll involve alleged interference with [plaintiffs'] employment rights as established by the various agreements that govern their wages and other benefits as well as their right to be fairly represented under [§ 152]. Thus the . . . rights at issue are founded upon federal law, derive their strength and protection from federal law, and exist to effectuate a nationwide federal labor policy.

387 F.3d at 321. Such claims must rise or fall based on their merit under the RLA.[6]

Parties whose conduct is governed by the RLA approach collective bargaining negotiations mindful of the incentives and penalties set forth in the Act. As in Jacksonville Terminal, the imposition of additional state regulation on core RLA conduct would alter the balance struck by Congress in this regard. See 394 U.S. at 381. "[T]he potentials for conflict, and for the imposition of inconsistent state obligations, are simply too great" to allow each state to regulate conduct central to Congress's RLA goals. Id. (internal citations omitted). This task "'cannot be left to the laws of the many States, for it would be fatal to the goals of the Act' if conduct were prohibited by state laws 'even though in furtherance of the federal scheme. The needs of the subject matter manifestly call for uniformity.'" Id. (quoting *International Ass'n of Machinists AFL-CIO v. Cent. Airlines, Inc.*, 372 U.S. 682, 691-92, 83 S. Ct. 956, 10 L. Ed. 2d 67 (1963)). We easily conclude that the

imposition of additional state liability on the defendants for conduct during collective bargaining negotiations would upset the "balance of power" established by the RLA, *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619, 106 S. Ct. 1395, 89 L. Ed. 2d 616 (1986), and "frustrate effective implementation of the [Act's] processes," *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 380.

Plaintiffs submit that there is, in fact, "no conflict" between their state common law claims and the RLA. Appellants' Br. at 37. The point requires little discussion. In Garmon, the Supreme Court observed that, even if application of state law "in a particular situation will not, in fact, conflict with the active assertion of federal authority," the state claim is nevertheless preempted because "two law-making sources" may not govern labor policy. *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. at 247. Similarly, in Jacksonville Terminal, the Court held the state regulation preempted not because it actually conflicted with the RLA, but because of the "potentials for conflict" that would arise if each state were entitled to set its own standard. 394 U.S. at 381. In sum, actual conflict is not a prerequisite to finding a state claim preempted by the RLA.

Plaintiffs have failed to offer any compelling argument as to why their state law claims are not governed by the well-settled line of precedents deriving from Garmon and Jacksonville Terminal.[7] Nor have plaintiffs attempted to demonstrate that either of the exceptions recognized in Garmon applies to their claims. Accordingly, we conclude that the district court

correctly dismissed Courts Eleven, Twelve, and Sixteen as preempted by the RLA.[8]

D. Plaintiffs' Claim of a Breach of the Duty of Fair Representation

Plaintiffs submit that the district court erred in granting summary judgment in favor of APFA on the claim of a breach of the union's duty of fair representation. We disagree.

1. The Duty of Fair Representation Under the RLA

"The statutory duty of fair representation was developed [in the 1940s] in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act." *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967). In these cases, the Supreme Court ruled that "the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Id.; see *Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers*, 378 F.3d 269, 276 -77 (2d Cir. 2004). This "tripartite standard" applies to "'challenges leveled not only at a union's contract administration and enforcement efforts but at its negotiation activities as well,'" i.e., to both "major" and "minor" disputes under the RLA. *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 77, 111 S. Ct. 1127, 113 L. Ed. 2d 51 (1991) (quoting *Communications*

Workers v. Beck, 487 U.S. 735, 743, 108 S. Ct. 2641, 101 L. Ed. 2d 634 (1988)).[9]

The Supreme Court has emphasized that a court's "substantive examination of a union's performance [is] highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. at 78. "For that reason, the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly as so far outside a wide range of reasonableness that it is wholly irrational or arbitrary." Id. (internal citation and quotation marks omitted). The rationality of a union's decision must be evaluated "in light of both the facts and the legal climate that confronted the negotiators at the time the decision was made." Id. To demonstrate "bad faith" representation by a union, a party must show "improper intent, purpose, or motive." *Spellacy v. Airline Pilots Ass'n-Int'l*, 156 F.3d 120, 126 (2d Cir. 1998) (observing that "[b]ad faith encompasses fraud, dishonesty, and other intentionally misleading conduct"). Even if a party makes such a showing, it must further demonstrate a causal connection between the union's misconduct and the complained-of injury. *Id.*

2. Plaintiffs' Failure To Adduce Evidence of Irrational or Arbitrary Conduct

Plaintiffs point to numerous decisions taken by APFA in its negotiations with American Airlines that they submit raise triable issues of fact as to the irrationality and arbitrariness of the union's representation. See Fed. R. Civ. P. 56(c). We consider each in turn and conclude that plaintiffs' argument is without merit.

At the outset, we note that the record is replete with evidence that American Airlines was, in fact, in dire economic straits at the time the parties entered into the negotiations that led to the Restructuring Participation Agreement. For example, American Airlines had a net loss of $ 3.5 billion in 2002, and by 2003 the airline was experiencing cash losses of approximately $ 5 million per day. Further, two of American Airlines' primary competitors, US Airways and United Airlines, had filed for bankruptcy protection in August 2002 and December 2002, respectively. These circumstances preclude any reasonable factfinder from concluding that APFA entered into the challenged negotiations with American Airlines irrationally, arbitrarily, or in bad faith.

Nor will the evidence admit an inference of arbitrariness or bad faith in the voting procedures used by APFA in seeking membership ratification of the Restructuring Participation Agreement. Plaintiffs take issue with the union's use of a telephonic balloting service provided by American Airlines rather than mail-in balloting, and with the use of a password supplied by American Airlines to monitor such balloting. Given the time-sensitive nature of the circumstances, APFA's reliance on telephonic balloting and its monitoring of the vote through a website established by American Airlines is insufficient, by itself, to permit a finding of bad faith.

Plaintiffs suggest that a jury could infer APFA's bad faith from its agreement to a ratification voting deadline of April 15, 2003, two days before American Airlines filed its 10K form revealing the terms of a Special Executive Retirement Plan. Plaintiffs failed,

however, to adduce any admissible evidence supporting their conclusory assertion that APFA officials knew of the retirement plan when they agreed to the voting schedule. Indeed, plaintiffs do not address testimonial evidence that APFA officials did not have any notice of the retirement plan until its public disclosure on April 17. This record is insufficient to demonstrate a genuine dispute of material fact warranting trial. See Fed. R. Civ. P. 56(c).

Plaintiffs further submit that APFA's decisions to extend the voting deadline to April 16 and to permit members to change votes were taken in bad faith. Once again, plaintiffs make a bald assertion -- that "the principal, or sole, reason APFA did so was to reverse the [initial negative] outcome," Appellants' Br. at 42 -- without pointing to any supporting admissible evidence. In fact, the record evidence demonstrates that APFA sought an extension through the end of April to provide its members with more time to consider the terms of the Restructuring Participation Agreement and to accommodate certain members who had had trouble casting votes. It was American Airlines that refused to agree to such an extension and, on April 15, offered the alternative of one further day of voting. There is no record evidence that would permit a factfinder to identify bad faith in APFA's acceptance of the one-day extension. See generally *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1521 (11th Cir. 1988) (finding no breach of the duty of fair representation where union urged ratification of collective bargaining agreement because it 'accurately reflected its negotiation efforts with the Company and the economic crisis in the steel industry").

Like the district court, we also identify no record

support for plaintiffs' claim that APFA acted arbitrarily or in bad faith in finalizing the April 25, 2003 acceptance of a modified Restructuring Participation Agreement. Following disclosure of the Special Executive Retirement Plan, on April 22, 2003, APFA determined that the Restructuring Participation Agreement was no longer valid and would have to be put to a re-vote. The next day, a four-person congressional delegation met with various American Airlines officials, including CEO Donald Carty, APFA head John Ward, and the heads of two other unions that had ratified the Restructuring Participation Agreement. As a result of those discussions, American Airlines unilaterally acceded to several APFA demands, including a one-year reduction in the duration of the Restructuring Participation Agreement, an option for the union to reopen that Agreement after three years, and an "Annual Incentive Program." Plaintiffs do not dispute that these concessions benefitted APFA members. As a result of these discussions, American Airlines CEO Carty also resigned.

APFA leaders met with the new American Airlines CEO, Gerard Arpey, on April 24, 2003. The union requested that the airline defer filing for bankruptcy until after the re-vote, and it sought an additional amendment to the "underfly" provision of the Restructuring Participation Agreement. American Airlines agreed to remove the "underfly" provision and to substitute a different concession of equal value in its place, but it informed APFA that, if it did not finalize the Restructuring Participation Agreement by April 25, the airline would declare bankruptcy. The APFA Board of Directors considered this proposal and, on

April 25, finalized the agreement. This record provides no support for plaintiffs' assertion that APFA's actions were "so far outside a wide range of reasonableness" as to be irrational. *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. at 78 (internal quotation marks omitted).

Accordingly, we conclude that summary judgment was appropriately entered in favor of APFA on plaintiffs' claim of breach of the duty of fair representation.

III. Conclusion

To summarize, we conclude as follows:

1. Plaintiffs' RLA claims against American Airlines pursuant to 45 U.S.C. § 152, First and Seventh were properly dismissed because those provisions do not provide a private cause of action for an employee against an employer.

2. Plaintiffs' state law claims against American Airlines and APFA for breach of contract and intentional interference with contract were properly dismissed because these state law claims are preempted by the RLA.

3. Summary judgment was properly entered in favor of APFA on plaintiffs' claim of breach of the duty of fair representation because plaintiffs failed to adduce evidence raising a colorable question of fact on the issue of whether APFA's actions were so far outside a wide range of reasonableness as to be wholly irrational, arbitrary, or undertaken in bad faith.

Accordingly, the judgment of the district court in favor of defendants is AFFIRMED

Footnotes

*Judge Joseph F. Bianco, of the United States District Court for the Eastern District of New York, sitting by designation.

1Section 152, Fourth instructs that an employer may not "deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees." 45 U.S.C. § 152, Fourth. Section 152, Third instructs that neither labor nor management may "interfere with, influence, or coerce the other [party] in its choice of representative." 45 U.S.C. § 152, Third.

2Section 152, Second instructs that all disputes between a carrier and its employees "shall be considered, and, if possible, decided . . . in a conference between [designated] representatives." 45 U.S.C. § 152, Second. Section 152, Ninth instructs the Mediation Board to resolve disputes "as to who are the [designated] representatives." 45 U.S.C. § 152, Ninth.

3We have expressed some doubt about whether, in light of more recent cases, we may still imply a private right of action based on the Cort v. Ash factors. See *Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, 286 F.3d 613, 619 (2d Cir. 2002) (noting that, after Cort v. Ash, the Supreme Court "focused the analysis on the single question of whether congressional intent

to create a private cause of action can be found in the relevant statute"); *Olmsted v. Pruco Life Ins. Co. of N.J.*, 283 F.3d 429, 434 (2d Cir. 2002) (noting that recent Supreme Court decisions have "subordinat[ed the Cort v. Ash factors] to statutory text"). Sandoval, however, does not purport to overrule *Cort v. Ash*. Accordingly, we apply these factors to illuminate our analysis of congressional intent.

4We discuss plaintiffs' claim against APFA for breach of the duty of fair representation infra at [25-31].

5The RLA provides for criminal enforcement of § 152, Third, Fourth, Fifth, Seventh, and Eighth -- not § 152, First. See 45 U.S.C. § 152, Tenth.

6We note, with respect to plaintiffs' breach claim against APFA, that plaintiffs have alleged no independent duty owed them individually under the contract. See *United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 374, 110 S. Ct. 1904, 109 L. Ed. 2d 362 (1990) ("If an employee claims that a union owes him a more far-reaching duty [than the duty of fair representation], he must be able to point to language in the collective-bargaining agreement specifically indicating an intent to create obligations enforceable against the union by the individual employees."); see also *May v. Shuttle, Inc.*, 129 F.3d 165, 179, 327 U.S. App. D.C. 82 (D.C. Cir. 1997) (holding RLA duty of fair representation claim preempts "identical" state law claims of fraud and deceit); *Nellis v. Air Line Pilots Ass'n*, 15 F.3d 50, 51 (4th Cir. 1994) (same); *Peterson v. Air Line Pilots Ass'n, Int'l*, 759 F.2d 1161, 1170 (4th Cir. 1985) (noting that state law tort claims were "essentially identical" to duty of fair representation

claim and therefore dismissing state claims as preempted by RLA).

7Plaintiffs cite several non-RLA cases to support their contrary argument, none of which is relevant to our analysis. See, e.g., *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63, 123 S. Ct. 518, 154 L. Ed. 2d 466 (2002) (construing the express preemption clause of the Federal Boat Safety Act of 1971 and concluding that it does not preempt common law claims); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (construing the express preemption provision of the Medical Device Amendments of 1976); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995) (construing preemption provision of National Traffic and Motor Vehicle Safety Act of 1966 and concluding that it did not preempt common law claim on issue for which federal law provided no standard).

8Plaintiffs also argue that the district court erred in concluding that the APFA constitution is not enforceable as a contract. The court held no such thing. Indeed, the court had no need to determine whether the constitution was enforceable as a contract because it dismissed the contract claim on a different ground, i.e., that "[t]he allegations underlying plaintiffs' claim for "breach of the union constitution" are, in substance, identical to those in plaintiffs' DFR [duty of fair representation] claims" and are therefore preempted by the RLA. *Marcoux v. Am. Airlines, Inc.*, F. Supp. 2d , 2008 U.S. Dist. LEXIS 55751, 2008 WL 2828599, at *26. Because we affirm on that same ground, we need not address the enforceability issue.

9The district court properly identified this tripartite standard and fairly applied it in thoroughly reviewing the evidence relevant to plaintiffs' fair representation claim. See *Marcoux v. Am. Airlines, Inc.*, 2008 U.S. Dist. LEXIS 55751, 2008 WL 2828599, at *22-26. Thus, there is no merit to plaintiffs' argument that the award of summary judgment on this claim was infected by application of an incorrect legal standard. In any event, we review the challenged judgment de novo and conclude for ourselves that judgment was properly entered in favor of APFA.

04 CV 1376 (NG)(KAM),03 CV 4987 (NG)(KAM),04 CV 634 (NG)(KAM)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NEW YORK

ANNE M. MARCOUX, JILL LINDSAY, KIRSTEN EVANS, CONSTANCE LaMATTINA, ELIZABETH LEE PRICE, JUDITH ALEXANDER, DEBORAH DEAN, CHRISTINA FORD, PATTI GENTRY, LaTONYA K. GILLMORE, JANET GOLD, DALE HAGAR, JULIE HORAN, LOUIS HORTER, CAROL JOHNSON, MOLLY KAIMAN, BEVERLEY KALKHOF, NANCYANNE KELLO, PATRICIA KENNEDY, JANET KIRBY, JOHN KLINE, DOTTIE LONG, KAREN RIVOIRA, LAURENCE E. SALOMON III, DANIEL SANTIAGO, REBECCA SMITH, and DEBORAH WHITTINGTON on Behalf of themselves and all others similarly situated (i.e., the "Class"); CONSTANCE LaMATTINA also on behalf of Subclass I, KIRSTEN EVANS, JILL LINDSAY and ELIZABETH LEE PRICE also on Behalf of Subclass II; DEBORAH WHITTINGTON also on Behalf of Subclass III, and JANET KIRBY also on Behalf of Subclass IV,

Plaintiffs,

-against-

AMERICAN AIRLINES, INC., A.M.R. CORPORATION, ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, and JOHN WARD, as President of Association of Professional Flight Attendants,

Defendants.

July 22, 2008, Decided
July 22, 2008, Filed

OPINION AND ORDER

GERSHON, United States District Judge:

Plaintiffs bring this action against Defendants American Airlines, Inc. ("American," or the "Company"), A.M.R. Corporation ("AMR" or, together with American, the "Company Defendants"), the Association of Professional Flight Attendants ("APFA" or the "Union"), and John Ward, in his capacity as President of APFA ("Ward," also included in "APFA" or the "Union"). In light of this court's previous Order, *see Marcoux v. Am. Airlines, Inc.*, 2006 U.S. Dist. LEXIS 14130 (E.D.N.Y. March 28, 2006), remaining against Company Defendants are hybrid claims for breach of the duty of fair representation ("DFR") and violations of the Railway Labor Act ("RLA"), 45 U.S.C. §§151 *et seq.*; remaining against APFA are claims for breach of the DFR and breach of the APFA constitution.

All defendants move for summary judgment dismissing the remaining claims. Plaintiffs move for class certification and for summary judgment on all claims except the claim against APFA for breach of the APFA constitution. For the reasons set forth below, the motions for summary judgment filed by Company Defendants and APFA are granted in their entirety; plaintiffs' motion for summary judgment is denied, and their motion for class certification is denied as moot.

FACTS

Unless otherwise indicated, the facts set forth below are undisputed. American is a "carrier by air" within the meaning of the RLA, 45 U.S.C. § 181. AMR is the publicly-traded parent company of American. At all pertinent times, APFA was the certified and exclusive representative of the class of flight attendants employed by American and is a "labor organization" within the meaning of the RLA. Ward served as President of APFA from April 2000 through August 2004. At all pertinent times, plaintiffs were members of APFA.

I. The 2001 Collective Bargaining Agreement and Events Leading to Negotiation of the Restructuring Participation Agreement

A. Collective Bargaining Between APFA and American Between 1998 and 2001

Between 1998 and 2001, APFA and American engaged in Section 6 negotiations under RLA, 45 U.S.C. § 156. [1] In June 2001, on the last day of the "cooling-off" period, APFA and American reached a tentative agreement on the terms of a new Collective Bargaining Agreement (the "2001 CBA" [2]). The tentative agreement provided "industry-leading wages" and working conditions and was ratified by a 96% affirmative vote of the APFA membership, tabulated on September 12, 2001. The CBA was to continue until becoming "amendable" on November 30, 2004. [3] Early in 2001, as part of what would come to be known as the "turnaround plan," American responded to financial difficulties by altering

its business plan to remain competitive with low-cost carriers.

B. September 11, 2001

As a result of the terrorist attacks of September 11, 2001, the major airlines suffered billions of dollars of losses. American's net loss in 2002 was $ 3.5 billion and it projected an additional loss of $ 1 billion in the first quarter of 2003.

Thus, in 2002, after comparing its labor costs to those of its competitors, American developed a cost-cutting strategy relating to its pilots, mechanics, flight attendants, and other non-labor sources. American decided it needed to cut labor costs associated with the flight attendant group by $ 340 million annually to remain competitive. It also identified $ 2 billion in annual cost reductions that could be obtained through sources other than labor. Notwithstanding these cost-cutting plans, American, during this period, funded a retirement plan providing bankruptcy-protected pension benefits to senior officers. *See below* Facts § IV.

By letter dated December 6, 2002 from American's then-CEO, Don Carty ("Carty"), and its then-President, Gerard Arpey ("Arpey"), American requested that APFA, as well as the Allied Pilots Association ("APA"), and the Transport Workers Union ("TWU"), the bargaining representative for the Company's mechanics and other ground employees, agree to forgo two upcoming compensation increases provided under the 2001 CBA, namely, a 3% pay increase scheduled to take effect January 1, 2003, and a further increase scheduled

to take effect in July 2003. American recognized at the time that, even if APFA agreed to the requested concessions, American's economic turnaround would not be complete. American stated that the concessions were non-negotiable.

In response to American's December 2002 request to forgo pay increases, APFA informed the Company that it would conduct a detailed review of the Company's finances to determine if there was a legitimate need for the relief American sought. APFA retained Mark King as a financial advisor to assist with its review of American's finances. King had assisted the APFA Negotiating Committee in the negotiations that led to the 2001 CBA. By January 1, 2003, however, APFA's financial review had not yet concluded, and the Company implemented the 3% pay increase as required under the 2001 CBA.

C. American's Requests for Labor Concessions and APFA's Initial Response

The Company's financial condition declined in the first quarter of 2003 to a greater extent than previously projected. American was losing cash from operations at the rate of approximately $ 5 million per day -- nearly $ 7.5 million per day if capital expenditures and debt service were included, and between $ 14 and $ 21 million per day if pension contributions were included.
In early February 2003, the Company made additional demands for cost-saving contractual concessions from each of its unions, including APFA. Specifically, it demanded $ 1.6 billion in annual "permanent" labor cost reductions, i.e., cost savings of $ 1.6 billion per year on an ongoing basis, from APFA, the APA, and TWU. Of

this amount, the Company indicated that $ 340 million annually would be required from the flight attendant workforce.

Soon after APFA received American's February 2003 demand for concessions, Ward convened a meeting of the APFA Board of Directors ("BOD") on February 11-12, 2003. [4] The BOD "received a thorough briefing and analysis from [its] . . . advisors and a presentation from the APFA Negotiating Committee." Ward Dep. 257-58.

On February 12, 2003, the BOD adopted a resolution stating that

> APFA is committed to the survival of the Company and recognizes the importance to the membership of taking appropriate steps to ensure that the Company is a viable and successful entity which, at the same time, respects the needs and legitimate rights and expectations of its employees and specifically of the American . . . flight attendants.

It further provided for "a comprehensive, multi-faceted plan of action" designed to continue APFA's financial analysis of the Company and prepare for concessionary negotiations that might ensue. The BOD directed "the Negotiating Committee, under the direction of the APFA President, . . . to take all necessary action . . . to be able to expeditiously address varying contingencies." *Id.* The BOD's "overriding obligation was to . . . best protect the interests of the Flight Attendants." President's Report, Ward Ex. 10.

D. Risk of Bankruptcy

In late February or early March 2003, American CEO Carty informed APFA, at a special APFA BOD meeting, that American would file for bankruptcy protection unless it obtained an agreement from APFA by March 31, 2003 that provided the $ 340 million in annual cost reductions that American was demanding. American set the same deadline for APA and TWU to reach agreements, in the absence of which the Company would file for bankruptcy.

The APFA BOD met again in the second week of March 2003. At that meeting, it adopted a Resolution dated March 10, 2003 stating, "the best interests of the membership will be served by taking all appropriate action to expeditiously address the Company's financial situation," and directing APFA President Ward and the APFA negotiating team and advisors "to take any and all actions needed to reach a negotiated consensual agreement with American . . . in order to avoid bankruptcy." The BOD adopted this Resolution after receiving "presentations regarding the Company's financial situation and the time constraints from APFA's outside economic consultant, . . . APFA's Standing Negotiating Team," and "representatives of TWU, APA and American Airlines concerning the validity of the [Company's] request [for concessions] . . . ."

To assist APFA in its dealings with American, APFA retained, in addition to King, Leon Potok (another financial advisor), to further assess the Company's financial situation. APFA's advisors reviewed publicly available information and information provided by the Company, consulted with advisors retained by APA and TWU, and conferred with APFA's Negotiating

Team, the Union's Officers, and Company representatives. American "made its financial plans and backup information available to [APFA] and to [its] financial advisors . . . to a far greater extent than it ever had done before." President's Report, Ward Ex. 10. [5]

On February 11, 2003, King advised the APFA negotiating team in a power point presentation that the relief APFA should grant the company should be of a short-term nature because American faced a short-term cash problem. He further advised APFA that, because American was forecasting improvement, "it would be desirable to wait until May or June to determine whether cash relief is needed." King Dep. 65-66. However, in March 2003, King revised earlier evaluations and concluded that American's financial situation was deteriorating faster than he had previously believed, although he "never completely agreed with the company's position that it was deteriorating as quickly as it said it was." *Id.* at 144-45. Potok reached the conclusion that American's requests for financial concessions were warranted. At his deposition, he explained his conclusion:

> The company had lost significant amount of money, it was projecting to lose a significant amount of money, it was not simply a cyclical problem they were facing, it was structural, they had to address, as did the other main line airlines, and in the absence of fixing their problems no prudent management or board would continue coasting along throwing money out the windows.

Potok Dep. 212-13. He recalled that, in March of 2003, he advised APFA with regard to whether the management of American had a basis for seeking Chapter 11 bankruptcy protection:

> The company was seeking to get cost reductions in a time when it was in a negative cash flow, projected negative cash flow situation. And in the absence of such cost savings and in the absence of a deal with labor, it was reasonable to expect that the company would file for Chapter 11.

Id. at 37. Based on the analysis and presentation of APFA's financial advisors, APFA's leadership concluded that American's threats to file for bankruptcy in the absence of concessions were serious.

II. March 2003 APFA-American Discussions Lead to a Tentative Agreement

A. The APFA-American Discussions

In March 2003, American advised APFA that, if the Company filed for bankruptcy, it intended to reduce its aircraft fleet by 85 to 90 planes, with the consequence that at least 2,500 flight attendants would be furloughed over and above the furloughs that would result from implementation of the $ 340 million concessionary agreement. Also, in bankruptcy, American would seek at least an additional $ 130 million a year in cuts above the concessions it was seeking out of bankruptcy and lay off substantially more employees. These additional concessions would have been required to offset the substantial costs associated with

bankruptcy. The Company communicated both privately and publicly to the three unions that it was prepared to file for bankruptcy on March 31, 2003.

During these discussions, neither side served the other with a Section 6 notice or said it was proceeding under Section 6 of the RLA. Both sides recognized that the changes to the CBA sought by American were substantial.

To provide information to flight attendants regarding the negotiation process, Ward recorded a telephone hotline message accessible to union members. He stated that APFA was willing to make concessions because, "as dreadful as the Restructuring Agreement is, the Company's bankruptcy proposal -- that is what they would seek to achieve in bankruptcy from the court -- is far worse." APFA Hotline Message, April 4, 2003.

Also during this period, APFA issued an update to membership stating:

> The three labor unions, after exhaustive research by each union's economic advisors, have determined that [American] is in serious financial trouble. This situation is deteriorating rapidly. . . .
>
> The APFA Negotiating Table Team . . . [is] working tirelessly to come up with a consensual tentative agreement on a concessionary package. How much this package will be worth (as compared to the Company's $ 340 million request) has not yet been agreed to by the

> parties. However, [American] indicates it needs the full amount to avoid a bankruptcy filing. . . .
>
> If . . . a package is concluded then it will then be submitted to the membership for a ratification vote. . . . If any single group rejects their respective package, the Company represents that it will likely be filing for bankruptcy.
>
> The APFA Leadership believes avoiding bankruptcy is in our membership's best interest. Bankrupt airlines often shrink operations, furlough employees and use the bankruptcy laws to abrogate parts of union contracts. Use of the Section 1113 process of the federal bankruptcy law may cause greater sacrifices in areas we do not necessarily desire.
>
> Because APFA is acting responsibly, it is seriously attempting to avoid bankruptcy. . . . [W]e still believe that obtaining an agreement between the parties is likely to be better than leaving the decision to a bankruptcy judge. Because of this, we will try to reach a deal regardless of how pessimistic things look.

American provided the restructuring terms on a take-it-or-leave-it basis. In mid-March 2003, American established unilaterally an April 15, 2003 deadline for APFA, TWU and APA to complete their respective membership ratification processes on the agreements they were required to reach with American by March 31, 2003, and informed the three Unions that, if they did not provide ratified agreements by the April 15, 2003 deadline, the Company would file for bankruptcy. Ward

informed American that the APFA Constitution required a 30-day balloting period. American refused to extend the deadline.

During discussions in the second half of March, American adhered to its previously-stated position that APFA would have to provide $ 340 million per year in cost savings to the Company and that anything less was unacceptable. During this time period, the Company stated that the Union could make proposals regarding the specific concessions to be included in the agreement, but the overall package would have to result in total annual savings valued by the Company at $ 340 million. APFA attempted to interject its own terms, but American was not receptive to them. Rather, American provided APFA with a list of possible concessions and placed a value on each. Steve Boilini, a flight attendant and member of APFA's negotiating committee, interpreted the BOD's direction to "take any and all necessary actions needed to reach a negotiated consensual agreement" to mean that "the negotiating team wasn't going in to actually negotiate. . . . [W]e were going in to do anything we could to make sure American Airlines did not go bankrupt." Boilini Dep. 25. Mr. Boilini understood it was the negotiating team's purpose to conclude an agreement. *Id.* The APFA leadership felt that American had "a gun to our heads." Ward Dep. 119-22. The situation "was nothing [APFA] had ever experienced before." Liz Mallon (member of APFA BOD) Dep. 113-14.

To meet the $ 340 million figure solely through wage cuts would have required reductions in flight attendant wage rates of 35%. APFA determined to avoid a wage reduction of this magnitude, demanding that

alternative concessions be included in the overall agreement. During the last two weeks of March 2003, APFA proposed contractual "snapbacks" providing a return to pre-concession terms and conditions of employment during the life of the agreement, as well as significant pay raises while the agreement remained in effect. The Company refused these requests because it viewed the concessions, not as a short-term change, but "a change in how the airline was going to operate in the future. . . . [W]hat [American was] doing would permanently change the company in light of what was happening in the industry." Jeffrey Brundage (former American Vice President of Employee Relations) Dep. 342-43. APFA also proposed other "upsides" for the flight attendants, e.g., unlimited recall rights for furloughees and a profit-sharing program, both of which were rejected by the Company. The Company sought to eliminate the flight attendants' defined benefit pension plan. APFA resisted these changes.

B. The Company's Bankruptcy Preparation and Section 1113 Proposal

The Company retained legal and financial advisors to help prepare for a bankruptcy filing. The Company also discussed with a group of financial institutions an arrangement to provide $ 1.5 billion in financing for the Company's operations while in bankruptcy. The Company intended to file for bankruptcy on April 15, 2003 if all three Unions did not ratify agreements by that date.

Shortly before the Company's March 31, 2003 deadline for the three unions to reach agreements with American, the Company provided APFA with its "§